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In The
Supreme Court of the United States

L.M., a minor by and through his Guardian ad litem, SAM M. and MARIETTE M.; SAM M., on his own behalf; MARIETTE M., on her own behalf,

Petitioners,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a school district's internal regulation restricting parents' access to observe and assess the school district's proposed placement or program for their special needs child to 20 minutes where the district has no such restriction violates parents' procedural due process rights under the Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA"), so as to conflict with this Court's prior rulings concerning IDEA.

PARTIES TO THE PROCEEDING

All the parties in this case are identified in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, L.M., a minor, by and through his Guardian ad litem, Sam M. and Mariette M.; Sam M. on his own behalf; and Mariette M. on her own behalf, respectfully petition for a writ of certiorari to review the February 13, 2009 judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended and superseding opinion of the Court of Appeals is reported at 556 F.3d 900 (9th Cir. 2009) and incorporates the Court of Appeals' decision denying the petition for rehearing *en banc*.

The March 28, 2006 Decision of the Office of Administrative Hearings, Special Education Division, State of California, is unreported. The March 13, 2007 opinion and order of the United States District Court for the Central District of California, Western Division, is not yet published but is available at 2007 U.S. Dist. LEXIS 97057.

JURISDICTION

On February 13, 2009, the Court of Appeals denied a timely petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 20 U.S.C. § 1400(d)(1)(A), providing that:

> The purpose of this chapter is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. . . .

2. 20 U.S.C. § 1401(9), providing that:

> The term "free appropriate public education" means special education and related services that –
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

3. 20 U.S.C. § 1415(a) and (b)(1), providing that:

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall

> establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.
>
> The procedures required by this section shall include the following: . . . An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

4. California Education Code § 56329(c), providing that:

> The public education agency may initiate a due process hearing pursuant to Chapter 5 (commencing with Section 56500) to show that its assessment is appropriate. If the final decision resulting from the due process hearing is that the assessment is appropriate, the parent or guardian maintains the right for an independent educational assessment, but not at public expense.
>
> If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of free appropriate public education to the child, and may

> be presented as evidence at a due process hearing pursuant to Chapter 5 (commencing with Section 56500) regarding the child. If a public education agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an *equivalent opportunity* shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding. (emphasis added.)

5. Capistrano Unified School District Administrative Regulation, Procedures Regarding Visitors/ Outsiders § 2.1, ("20 Minute Limit"), providing that:

> In order to implement these provisions, the Superintendent is hereby designating the principals as those responsible for the scheduling of these visitations in order to minimize interruption of classroom instruction. Classroom visits should be preceded by two days prior notice to the teacher unless the teacher otherwise agrees, and scheduled at a time when the visit will not disrupt or interfere with planned activities. No classroom should have more than one visitation per week. Classrooms visits should be limited to 20 minutes unless the principal believes there are compelling circumstances

> for a longer visitation. A District employee should accompany any individual observing a classroom for the duration of the visitation. Visits should be limited to one individual in addition to the District employee. The observation should be conducted in such a manner as to minimize interference with classroom instruction, with the principal or his/her designee concluding the observation if at any time it becomes apparent that classroom activities/instruction are being disrupted.

STATEMENT OF THE CASE

Petitioners brought this action under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA"). Pet. App. 82a. In July 2004, when L.M. was two and a half years old, he was found to be an autistic child entitled to special education services under the Individuals with Disabilities Education Act. *Id.* at 64a. As a result of his autism, L.M. is severely disabled in terms of his communication, self-help, social and play skills. *Id.* at 47a. L.M. also displayed maladaptive behaviors in the form of noncompliance, inattention and tantrums as well as perseverative and self-stimulatory behaviors. *Id.*

In July 2004, L.M.'s parents, Petitioners Mariette M. and Sam M. ("Parents"), contacted the Regional Center of Orange County ("RCOC") which undertook a developmental assessment. As a result of that

process, effective September 2004, L.M. began receiving applied behavior analysis ("ABA") services, on a one-on-one basis, from Autism Comprehensive Educational Services ("ACES"). *Id.* at 48a. From September 2004 until January 21, 2005, the RCOC funded, initially at ten (10) hours per week and, subsequently, at fifteen (15) hours per week, the services performed by ACES. *Id.* at 65a. Since Parents did not consider that level of services to be sufficient, they privately funded additional services from ACES. *Id.* As of his third birthday, ACES provided twenty-five (25) hours per week of services to L.M. *Id.*

In anticipation of L.M.'s initial IEP meeting, Respondent Capistrano Unified School District ("School District") undertook multiple observations of L.M. District psychologist Luisa Martinez observed L.M. three times for one (1) to one and one-half (1.5) hours on each occasion. Pet. App. 103a. Ms. Martinez testified that such a duration was necessary in order to conduct a relevant observation. *Id.* Both School District speech and language pathologist Melissa Echavez and the District's occupational therapist also conducted separate home observations of L.M. *Id.* at 65a. Subsequently, the School District also obtained leave, over Parents' objection, to have its expert, Paul Dores Ph.D., conduct a three (3) hour observation of L.M. in his home program purely for purposes of preparing to testify as an expert witness. *Id.* at 91a-92a, n.10. The total amount of time that the School

District and its expert observed L.M. was in the 7 to 10 hour range.

At the initial IEP meeting on January 10, 2005, the School District offered placement in a special education classroom ("SDC") at Palisades Elementary of approximately twenty (20) hours per week, "intensive behavioral instruction" of four hours per week and two-thirty minute sessions of speech and language therapy. Pet. App. 66a. Before indicating their consent or disagreement, Parents asked for permission to observe the proposed placement in the company of Dr. Melanie Lenington, a licensed clinical psychologist who was conducting an independent assessment of L.M. The School District responded that Dr. Lenington could observe for only 20 minutes at a time. *Id.* at 12a.

On February 7, 2005, Dr. Lenington traveled from the western Los Angeles to Capistrano Beach to conduct an observation of the proposed classroom placement; she was allowed to observe the SDC for only twenty (20) minutes. Pet. App. 91a.

The Parents indicated their disagreement with the proposed placement and, in March 2005, filed their request for a due process hearing under IDEIA. Pet. App. 12a. The matter was first submitted to a California Office of Administrative Hearings ("OAH") Special Education Division Administrative Law Judge ("ALJ"), who held a four-day hearing. *Id.* at 14a. The ALJ applied the Individuals with Disabilities in Education Act of 1997 ("IDEA"), rather

than IDEIA, because the School District's IEP offer was in effect both before and after July 1, 2005, when IDEIA became effective. *Id.* at 82a-83a.[1]

The ALJ held that there had been a procedural violation of IDEA on the part of the School District in restricting Dr. Lenington's observation to only 20 minutes, but that this violation did not constitute a denial of a free appropriate public education ("FAPE"). Pet. App. 90a-93a. The ALJ found that there had been a substantive denial of FAPE in the School District's failure to clearly offer 30 minutes of weekly individual speech-language therapy and in its failure to provide a transition plan separate from a placement offer. *Id.* at 93a-94a. Accordingly, the ALJ concluded that Petitioners were entitled to reimbursement for the in-home ACES program provided from January 22, 2005 to April 7, 2005, and for one hour of speech therapy per week provided during the period from January 22, 2005 to July 22, 2005, and from the start of the 2005-2006 school year to the date of the ALJ's determination. *Id.* at 99a.

Petitioners filed a Complaint in the United States District Court for the Central District of California appealing the decision of the OAH (the "OAH Decision"). Pet. App. 43a.

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[1] There is no relevant distinction between IDEA and IDEIA for the purposes of this certiorari petition.

Contrary to the OAH Decision that the 20 Minute Limit did not seriously interfere with Parents' rights, the District Court found that this limitation constituted "a procedural violation of the IDEA. . . . [under which Petitioners] were denied their right to meaningfully participate in the IEP, and thus were denied a FAPE." Pet. App. 54a. The District Court found that the School District had thereby violated California Education Code § 56329(c), which requires that a parent's expert have an opportunity to observe the proposed placement which is *"equivalent to any observation conducted by a school district,"* and "frustrated the purpose of California Education Code § 56329 by denying Petitioners the opportunity to gather evidence regarding the appropriateness of placing [L.M.] at the SDC." *Id.* (emphasis added.) In doing so, the District Court recognized the purpose of section 56329 of the California Education Code, a provision consistent with the IDEA: (1) "to 'level the playing field' – i.e., to ensure that students and their parents have an equal ability to present information regarding the school district's programs at the administrative hearing." *See, e.g., Benjamin G. v. Special Educ. Hearing Office*, 131 Cal. App. 4th 875, 881, 32 Cal. Rptr. 3d 366 (2005). The District Court ordered reimbursement for all privately funded educational expenses incurred between the date of L.M.'s third birthday and the date of his next annual IEP, and remanded to the ALJ for a determination on the reimbursement amount. Pet. App. 59a-60a. At that same time, the District Court also determined that L.M.'s privately funded, in-home educational services

were appropriate. *Id.* at 58a. The District Court also granted Petitioners' motion for attorney fees. *Id.* at 29a-30a.

The School District appealed the District Court's Order to the United States Court of Appeals for the Ninth Circuit. Pet. App. 17a. On appeal, the Ninth Circuit reversed the decision of the District Court on a clear error standard. *Id.* at 29a. While the Ninth Circuit agreed with the District Court's finding that the School District's 20 Minute Limit comprised a procedural violation of the IDEA and a violation of California Education Code § 56329, the Ninth Circuit found such violation to constitute "harmless error." Pet. App. 22a. The Ninth Circuit held that the School District's policy of limiting Parents' classroom observation opportunities to twenty minutes was harmless "because Parents nevertheless had a full opportunity to participate in the process to fashion an educational plan for L.M. with help from an informed and knowledgeable expert." *Id.* at 10a.

REASONS FOR GRANTING THE PETITION

This case raises the fundamentally important question of whether a school district's internal regulation restricting a parent's access to observe and assess a proposed in-district placement or program for their special needs child, where there are no corresponding restrictions upon the district's opportunities

to observe and assess, is a restriction that violates the parents' procedural due process rights under the Individuals with Disabilities Education Act ("IDEA"). Procedural due process is a fundamental right born out of the Fourteenth Amendment. *Washington v. Glucksburg*, 521 U.S. 702 (1997). Procedural due process lies at the heart of IDEA's protections. *Bd. of Educ. of Hendrick Hudson Cntrl. Sch. Dist. Westchester Cty. v. Rowley*, 458 U.S. 176, 182-183 (1982). This Court has recognized that parents' procedural due process is a key element of IDEA. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 53 (2005). The Ninth Circuit, however, disregarded that important determination when it found that while there had been a procedural violation of Parents' due process rights under IDEA, such violation was insignificant. Pet. App. 23a-24a.

The core of the IDEA is that education for students with disabilities is individualized and requires cooperation, collaboration, and the exchange of information between parents and their child's school district. 20 U.S.C. § 1400, *et seq.*; *see Schaffer*, 546 U.S. at 60; *Rowley*, 458 U.S. at 200-01; *Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007); *School Committee of the Town of Burlington v. Massachusetts*, 471 U.S. 359, 368 (1985) (noting Congress's recognition that in any dispute, the school district would have a "natural advantage"). However, the procedural safeguards of the IDEA are intended to assure parents a "level playing field" in challenging a school district's

proposed placement. *See Schaffer*, 546 U.S. at 53. These procedural safeguards are critical given this Court's decision in *Schaffer*, which placed the burden squarely on parents to prove that the school district's proposed program and placement is inappropriate. 546 U.S. 49. The school district regulation at issue in the underlying case, the 20 Minute Limit, restricts "visitors" and other "outsiders" from conducting classroom observations in the District to only 20 minutes in any given week. Capistrano Unified Sch. Dist. Admin. Regulation, Procedures Regarding Visitors/Outsiders § 2.1. No such restriction, however, is applicable to the District's own classroom observations.

The 20 Minute Limit violates procedural due process under the IDEA because, on its face, it restricts parents and their independent evaluators from obtaining information about a proposed placement by prohibiting parents and their experts from conducting a classroom observation greater than a 20 minute "snapshot." The School District, in stark contrast, may conduct unlimited observations, thereby denying parents the "equivalent" opportunity the California Code ostensibly guarantees them. Even the School District's experts agreed that twenty minutes is plainly inadequate where the subject of observation is a child with autism, an enigmatic disorder with a variety of features and indicators that need to be observed over a substantial period of time so as to include transitions between activities, meals, interactions with others, etc. Pet. App. 103a.

In derogation from the "level playing field" assurances mandated in IDEA, the 20 Minute Limit deprives parents of an equivalent opportunity to assess the appropriateness of the recommended placement and infringes upon their ability to participate meaningfully in the development of their child's individualized education program. Such a deprivation is all the more devastating to parents' due process rights in light of this Court's decision in *Schaffer*, which imposes upon parents the burden to prove that the school district's proposed placement and program is inappropriate. Parents who must meet the *Schaffer* burden already have one hand tied behind their backs; the 20 Minute Limit functionally ties the other. This Court, in *Schaffer*, never intended for school districts to take undue advantage of a parent's evidentiary burden.

I. OVERVIEW OF THE IDEA

The IDEA guarantees all disabled children a "free appropriate public education" ("FAPE") which "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).[2] In *Bd. of*

[2] A FAPE is defined as special education and related services that: (1) are available to the student at public expense, under public supervision and direction, and without charge; (2) meet the state education standards; (3) include an appropriate education in the state involved; and (4) conform

(Continued on following page)

Educ. of Hendrick Hudson Cntrl. Sch. Dist. Westchester Cty. v. Rowley, this Court found that "[i]mplicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . [thus] the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide an educational benefit to the handicapped child."[3] 458 U.S. at 200-01.

In *School Committee of the Town of Burlington v. Massachusetts*, this Court found that Congress recognized that in any disputes, the school district would have a "natural advantage." 471 U.S. at 368. In response Congress enacted "procedural safeguards," such as those set forth in section 1415 of the IDEA. *Id.*

In *Schaffer v. Weast*, this Court also reasoned that "[s]chool districts have a 'natural advantage' in ***information and expertise***, but Congress addressed

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with the student's Individualized Education Program ("IEP"). 20 U.S.C. § 1401(9).

[3] "Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or *de minimis;* rather, an IEP must be likely to produce progress, not regression or trivial educational advancement." *Houston Indep. Sch. Dist. v. V.P.*, ___ F.3d ___, 2009 WL 1080639 at *4 (5th Cir. April 23, 2009) (internal quotation marks and citation omitted).

this when it obliged schools to safeguard the procedural rights of parents and to ***share information*** with them." 546 U.S. at 60 (emphasis added).[4] This "framework . . . ensures procedural due process in the IEP context."[5] *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 19 (1st Cir. 2003); *see also Bd. of Educ. of Hendrick Hudson Cntrl. Sch. Dist. Westchester Cty. v. Rowley*, 458 U.S. at 205-206 ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard"); *see also Winkelman*, 550 U.S. at 524 (recognizing that IDEA "sets up general procedural safeguards that protect the informed

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[4] The *Schaffer* Court also noted that "[t]he core of the [IDEA], however, is the ***cooperative process*** that it establishes between parents and schools." 546 U.S. at 60 (emphasis added).

[5] An IEP is a written statement containing the details of the individualized education program for a specific child, which is crafted by a team that includes the child's parents and teacher, a representative of the local education agency, and, whenever appropriate, the child. 20 U.S.C. § 1401(14), § 1414(d)(1)(B). An IEP must contain: (1) information regarding the child's present levels of performance; (2) a statement of annual goals and short-term instructional objectives; (3) a statement of the special educational and related services to be provided to the child; (4) an explanation of the extent to which the child will not participate with non-disabled children in the regular class; and (5) objective criteria for measuring the child's progress. 20 U.S.C. § 1414(d).

involvement of parents in the development of an education for their child.").

The school district also must give parents an opportunity to present complaints regarding any matter related to the education or placement of the child, or the provision of a FAPE to the child. 20 U.S.C. § 1415(b)(6). Upon the presentation of such a complaint, the parent or guardian is entitled to an impartial due process administrative hearing conducted by the state or local educational agency, as determined by state law or by the state educational agency. 20 U.S.C. § 1415(f). The *Schaffer* Court decided that under the IDEA, "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." 546 U.S. at 62. Accordingly, in *Schaffer*, this Court confirmed that the "IDEA . . . ensures parents access to an expert who can evaluate all the materials that the school must make available. . . . [Parents] are not left to challenge the government without a realistic opportunity to access the necessary evidence, or ***without an expert with the firepower to match the opposition***." *Id.* at 60-61 (emphasis added). The Second Circuit has similarly observed that "[e]xpert testimony is often critical in IDEA cases, which are fact-intensive inquiries about the child's disability and the effectiveness of the measures that school boards have offered to secure a free appropriate public education. The IDEA's procedural safeguards ensure that children and parents can realize whatever benefits are due." *Murphy v.*

Arlington Cntrl. Sch. Dist. Bd. of Educ., 402 F.3d 332, 338 (2d Cir. 2005), *rev'd on other grounds*, 548 U.S. 291 (2006).[6]

II. FOR A CHILD DIAGNOSED WITH AN AUTISM SPECTRUM DISORDER, APPROPRIATELY-TAILORED TREATMENT IN THE EARLIEST STAGES OF EDUCATION IS CRUCIAL

An early, appropriate placement and program is especially important for children with autism. While the impact of autism upon children and families can be devastating, a scientific consensus has developed that early, intensive educational services offer children the prospect of ameliorating and even overcoming the developmental deficits associated with autism. With appropriate educational services, almost all children with autism can become more independent, and many can now claim realistic prospects for becoming self-sufficient. Some will even improve to the point where they appear indistinguishable from their non-disabled peers, participating in regular education classrooms alongside them. But these interventions are most effective when children with

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[6] In *Murphy*, the Second Circuit held that parents could be reimbursed under IDEA for expert consultant fees. 402 F.3d at 339. In reversing, this Court did not dispute the value of parental expert testimony under IDEA but instead determined that IDEA's fee-shifting provision did not cover non-attorney expert fees. 548 U.S. at 303-304.

autism can be identified and served early; as children grow older, our ability to positively affect their development diminishes.

Autism is a spectrum disorder encompassing a range of developmental disorders related to impaired social function, impaired communication and repetitive, stereotyped behaviors. The degree and manifestation of impairments can vary dramatically from individual to individual. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION at 69-75 (4th ed. 2000) ("DSM-IV-TR"); S. REP. NO. 109-318, 2-3 (Aug. 3, 2006). Most children with autism show an "inability to relate themselves in the ordinary way to people and situations from the beginning of life. . . ." Leo Kanner, *Autistic Disturbances of Affective Contact*, 2 Nervous Child 217 (1943), *reprinted in* CLASSIC READINGS IN AUTISM, at 41 (Anne M. Donnellan ed., 1985) (emphasis omitted). Approximately 40 percent of children with autism do not talk, and others have difficulty learning to use language for communicative purposes. S. REP. NO. 109-318 at 2; DSM-IV-TR at 70. Many children with autism also demonstrate restricted and stereotypical patterns of behavior or interests, an insistence on predictability, and great difficulty coping with unexpected changes to their routine. S. REP. NO. 109-318 at 3; DSM-IV-TR at 71. Although the symptoms of autism often are apparent at a young age, they can be overlooked or

misinterpreted; special training is required to recognize and properly diagnose the signs of autism.[7]

Education is the primary treatment for autism.[8] There is "abundant scientific evidence" that early, intensive instruction "can result in dramatic improvements for children with autism: successful integration in regular schools for many, *completely normal functioning* for some." Gina Green, *Early Behavioral Intervention for Autism*, *in* BEHAVIORAL INTERVENTION FOR YOUNG CHILDREN WITH AUTISM: A MANUAL FOR PARENTS AND PROFESSIONALS 29, 29 (Catherine Maurice et al. eds., 1996) (emphasis in original). Appropriate education offers the possibility that children with autism can achieve self-sufficiency and become functioning, contributing members of

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[7] *See, e.g., M.S. v. Fairfax Cty. Sch. Bd.*, No. 1:05cv1476 (JCC), 2007 WL 1378545, at *4 (E.D. Va. May 8, 2007) *rev'd on other grounds*, 553 F.3d 315 (2009) (school board classified child as non-categorical with mild mental retardation and speech and language impairment and did not acknowledge that the child was autistic until he completed middle school).

[8] *See* NAT'L RESEARCH COUNCIL, EDUCATING CHILDREN WITH AUTISM 12 (2001) ("Education . . . is currently the primary form of treatment in autism."); Green, *supra*, at 29 (whereas the effectiveness of early, intensive instruction in treating autism has repeatedly been shown, "[n]o other treatment for autism offers comparable evidence of effectiveness.") (citations omitted); Smith & Lovaas, *supra*, at 68 (educational approaches to the treatment of autism have been empirically validated, but biomedical interventions "appear to do little to alter the outcomes of individuals with autism."); Lovaas, *supra* note 12, at 3 ("Medically and psychodynamically oriented therapies have not proven effective in altering outcome.").

society rather than permanent financial and emotional burdens on their families and on the public treasury.[9] Over the course of the last two decades "virtually every study" has found that early and intensive intervention is effective, and there is now "little doubt" that appropriate intervention "can produce large, comprehensive, lasting and meaningful improvements in many important domains for a large proportion of children with autism." *Id.* at 38.[10]

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[9] For descriptions of autistic children who have grown into productive – even remarkable – adults, *see, e.g.*, OLIVER SACKS, AN ANTHROPOLOGIST ON MARS 244-296 (1995); CLARA CLAIBORNE PARK, EXITING NIRVANA (2001); STEPHEN M. SHORE, BEYOND THE WALL (2001); KAMRAN NAZEER, SEND IN THE IDIOTS (2006).

[10] *See* Geraldine Dawson and Julie Osterling, *Early intervention in autism*, *in* THE EFFECTIVENESS OF EARLY INTERVENTION 307, 314 (1997) (reviewing eight model early intervention programs and finding that "all of the programs were quite effective in fostering positive school placements, significant developmental gains, or both for a substantial percentage of their students"); Tristram Smith et al., *Intensive behavioral treatment for preschoolers with severe mental retardation and pervasive developmental disorder*, 102 AM. J. MENT. RETARD. 238, 238 (1997) (preschool children who received intensive behavioral treatment "made major increases in intellectual, academic, adaptive, and socioemotional functioning"); *id.* at 246-47 (preschool children who received intensive behavioral treatment scored in the average range on standardized intelligence tests and performed satisfactorily in regular classes several years after the treatment, compared to only 2.5% of autistic children who received minimal treatment); John J. McEachin et al., *Long-term outcome for children with autism who received early intensive behavioral treatment*, 97 AM. J. MENT. RETARD. 359, 367-68 (1993) (autistic children who

(Continued on following page)

However, it is crucial that the intervention take place as soon as possible, while the child's developing brain has the greatest degree of "neurologic plasticity." *See, e.g.*, Tristram Smith and O. Ivar Lovaas, *Intensive and early behavioral intervention with autism: the UCLA young autism project*, 10 INFANTS & YOUNG CHILD. 67-78 (1998). Leading federal agencies, professional organizations and educational institutions all have stressed the importance

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received early and intensive behavioral intervention prior to age 4 preserved their gains in intellectual and educational functioning at an average age of 13 years, and had average IQ scores which were 30 points higher than that of control subjects); Sandra L. Harris et al., *Changes in cognitive and language functioning of preschool children with autism*, 21 J. AUTISM DEV. DISORD. 281, 287 (1991) (IQ scores of young children increased an average of nearly 19 points after one year of intensive education); Sally J. Rogers and Hal Lewis, *An effective day treatment model for young children with pervasive developmental disorders*, 28 J. AM. ACAD. CHILD & ADOLESC. PSYCHIATRY 207, 207 (1989) (6 months of intensive intervention resulted in significant gains "in cognition, perpetual/fine motor, social/emotional, and language skills, which were maintained or increased over a 12- to 18-month treatment."); O. Ivar Lovaas, *Behavioral treatment and normal educational and intellectual functioning in young autistic children*, 55 J. CONSULT. & CLIN. PSYCHOL. 3, 7-9 (1987) (47% of autistic children who received intensive behavioral intervention achieved normal-range IQ scores and successful performance in public schools, compared with only 2% of autistic children who received less intensive intervention); *see generally* Committee on Children With Disabilities, American Academy of Pediatrics, *Technical Report: The Pediatrician's Role in the Diagnosis and Management of Autistic Spectrum Disorder in Children*, 107:5 PEDIATRICS 85 (May 2001), available at http://pediatrics.aappublications.org/cgi/content/full/107/5/e85 (accessed May 12, 2009).

of early intervention for children with autism.[11] Congress likewise has emphasized that "children with autism spectrum disorder identified early and enrolled in early intervention programs show significant improvements in their language, cognitive, social, and motor skills, as well as in their future educational attainment and decreased needs for special education services." S. REP. NO. 109-318 at

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[11] *See* NAT'L INST. OF HEALTH, DEP'T OF HEALTH AND HUMAN SERVS., AUTISM SPECTRUM DISORDERS: PERVASIVE DEVELOPMENTAL DISORDERS 17 (2007) ("One point that most professionals agree on is that early intervention is important."), available at http://www.nimh.nih.gov/publicat/nimhautismspectrum.pdf (accessed July 16, 2007); NAT'L INST. OF MENTAL HEALTH, DEP'T OF HEALTH AND HUMAN SERVS., REPORT TO CONGRESS ON AUTISM 2 (2006) ("Early intervention is critical for affected children to gain maximum benefit from current therapies."), available at http://www.nimh.nih.gov/autismiacc/autismreportFY2005.pdf (accessed July 17, 2007); Joicey Hurth et al., *Areas of agreement about effective practices among programs serving young children with autism spectrum disorders*, 12 INFANTS & YOUNG CHILD. 17, 21-26 (1999) (discussing general consensus that "[c]hildren who begin appropriate services earlier have better out-comes" and that the "earliest possible start to intervention" is an integral or defining part of the program); NAT'L RESEARCH COUNCIL, *supra* note 13, at 6 ("The committee recommends that educational services begin as soon as a child is suspected of having an autistic spectrum disorder."); *see generally* American Academy of Pediatrics, *supra* note 12. *See also* Cathryn Garland and Michael O'Hanlon, *Studying Autism Isn't Enough*, N.Y. TIMES (Nov. 21, 2006) ("There is broad consensus, as reflected in previous studies by the National Academy of Sciences and American Academy of Pediatrics, that early and intensive intervention is critical."), available at http://www.nytimes.com/2006/11/21/opinion/21ohanlon.1.html (accessed May 12, 2009).

10. Intervention "should begin as soon as possible, preferably in the preschool years, because young children have not yet fallen as far behind their typically developing peers and may have more neurologic plasticity than older children." Smith & Lovaas, *supra*, at 68-69.

Gains made through appropriate interventions can be lost or reversed if the child is moved to an inappropriate placement. *See* Green, *supra*, at 30-31 ("One of the keys to producing lasting treatment gains in children with autism is consistency."); American Academy of Pediatrics, *supra* note 12. "Children with autism have a profound ability to regress," and if intensive treatment is not maintained consistently, "you have to go back and reinvent the wheel, not completely, not from the ground up, but you are going to have to go back and basically retool." *J.H. ex rel. J.D. v. Henrico Cty. Sch. Bd.*, 395 F.3d 185, 190 (4th Cir. 2005) (quoting expert testimony). *See also Diatta v. Dist. of Columbia*, 319 F. Supp. 2d 57, 66 (D.D.C. 2004) (because of inappropriate placements, for the "foreseeable future" the child's education would be "remedial, in that educators, aides and his family will have to correct four years of mis-education").

Parents, then, simply cannot allow their child to languish in an inappropriate setting when every passing moment erodes potential benefits that can never be regained. For these children and their parents, "every moment counts." Laurie Tarkan, *Autism Therapy Is Called Effective, but Rare*, N.Y.

TIMES, Oct. 22, 2002[12] (describing the "horrible feeling of time slipping away and nothing being done" when parents of children with autism don't have access to appropriate treatment); *see also County Sch. Bd. of Henrico County v. R.T.*, 433 F. Supp. 2d 692, 696 (E.D. Va. 2006) ("a critical window of developmental opportunity was closing" for a child who was not receiving an adequate public education). Forcing a child with autism into a patently inappropriate IEP program and placement can have a calamitous and irreparable impact on the long-term development of the child, a decision no parent should have to make. At the very least, then, parents need to have an equivalent opportunity to observe and assess the school district's proposed program. The last thing a parent needs is a school district imposing a "20 minute" restriction, particularly where, as here, the school district does not live within this restriction.

The School District's 20 Minute Limit, far from being a mere technical violation of 20 U.S.C. § 1415 and California Education Code § 56329, violates the procedural due process rights of parents and the procedural safeguards promulgated to protect parents under the IDEA, most particularly those intended to assure parents an "equivalent opportunity" to observe the proposed placement. California Education Code § 56329(c).

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[12] Available at http://query.nytimes.com/gst/fullpage.html?sec=health&res=9C05E0D71F3DF931A15753C1A9649C8B63 (accessed May 14, 2009).

This Court has recognized on several occasions that Congress imposed "procedural safeguards" in IDEA to counterbalance the "natural advantage" held by school districts in evaluating a child's needs. *See Schaffer*, 546 U.S. at 60; *School Committee of the Town of Burlington v. Massachusetts*, 471 U.S. at 368; *Winkelman*, 550 U.S. at 524.

The School District's 20 Minute Limit for "outsiders" violated Parents' rights to procedural due process under the IDEA by creating a double standard that unduly restricted Parents' opportunity to observe matters that they needed to observe to determine whether the recommended placement was appropriate for their child. 20 U.S.C. § 1415. While Parents ("outsiders") were limited to 20 minutes by district fiat, the School District's expert was afforded repeated observations lasting from 1 to 1.5 hours, hardly "equivalent."

The impact of such a violation is particularly acute since under this Court's decision in *Schaffer*, parents now squarely bear the burden of proof in an administrative hearing challenging an IEP. Because the burden rests on parents to show that a school district has not provided their child with a FAPE, limiting the parents' access to observations or other information concerning the school district's proposed placement where the district is not so limited creates a double standard that improperly gives the school district an undue advantage and deprives parents of

a meaningful opportunity to sustain their burden at their child's due process hearing.

III. RESTRICTIONS ON THE PARENTS' ACCESS TO INFORMATION CONCERNING A PROPOSED PLACEMENT VIOLATES PARENTS' PROCEDURAL DUE PROCESS RIGHTS UNDER THE IDEA

Parents were denied their procedural due process entitlements under IDEA because the School District's 20 Minute Limit prohibited Parents from obtaining meaningful information about the proposed placement via their expert, information to which the School District had unfettered access. In the underlying decision, the Ninth Circuit agreed that a procedural violation of the IDEA had occurred. Pet. App. 20a. The Court then evaluated whether the violation "affected the substantive right of the parent or child." *Id.* "[P]rocedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunities to participate in the IEP formulation process, clearly result in the denial of a FAPE." *W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992) (citations omitted); *see M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 645 (9th Cir. 2004) (same); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2000) (same). The Ninth Circuit erred when it found that the district court "neglected to consider whether Parents' right was *significantly affected* by the District's procedural violation" and that there was nothing in

the record to support a finding that the procedural flaw deprived Parents of their rights to participate in forming the IEP. Pet. App. 23a.[13]

The 20 Minute Limit denied Parents "equivalent" access to information concerning the School District's proposed placement, which impeded Parents' ability to evaluate whether the proposed placement is appropriate and prevented them from participating in the development of the IEP in an informed manner. This failure on the part of the School District to cooperate with Parents violated the "core" of the IDEA and its procedural safeguards. 20 U.S.C. § 1415.

The 20 Minute Limit also violated Parents' procedural due process rights because it prevented them from being fully prepared at the hearing. Indeed, the School District's own psychologist, Luisa Martinez, acknowledged that she would require at least an hour to an hour and a half to conduct a meaningful observation. Pet. App. 103a. The "IDEA . . . ensures parents access to an expert who can evaluate all the materials that the school must make

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[13] In fact, this is precisely what the District Court considered when it correctly ruled that "[b]y limiting the time Dr. Lenington had to observe at Palisades, [the School District] not only technically violated Cal. Edu. Code § 56329, [the School District] also frustrated the purpose of Cal. Edu. Code § 56329 by denying [parents] the opportunity to gather evidence regarding the appropriateness placing Plaintiff L.M. at Palisades. The Court finds that this is a procedural violation of the IDEA." Pet. App. 53a-54a.

available. . . . [Parents] are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Schaffer*, 546 U.S. at 60-61. Here, the 20 Minute Limit resulted in an expert being deprived of the informational "firepower" to match the opposition. The ALJ found that the testimony of Parents' expert, Dr. Lenington, was entitled to less weight due to her lack of familiarity with the School District's program. Pet. App. 78a. The District's expert, Dr. Dores, not only had a lengthier period of time in which to conduct his observation, but he had helped design and continued to supervise the School District's program, and his testimony was correspondingly given more weight. *Id.* Since Dr. Dores enjoyed substantially unrestricted access to observe the proposed placement, the result was not surprising.

The 20 Minute Limit also stymies the policy of the IDEA, which "emphasizes special education and related services designed to meet [the] ***unique needs***" of students with disabilities. 20 U.S.C. § 1400(d)(1)(A) (emphasis added). The 20 Minute Limit assumes that an effective evaluation can be performed for every student in a short period of time, even multiple short periods of time. But the policy behind the IDEA is that children with disabilities are not cookies cut from the same mold, and in order to provide a FAPE that genuinely meets individual needs, the assessment process is critical. For a child with a disorder as enigmatic and pervasive as autism,

the expert's observation time cannot be limited by arbitrary fiat. As set forth in section II, *supra*, symptoms of autism range from an "inability to relate themselves in the ordinary way to people and situations from the beginning of life . . ."[14] to impaired communication and difficulty coping with unexpected changes to their routine. S. REP. NO. 109-318 at 2-3; DSM-IV-TR at 70-71. Thus, where children on the spectrum may be uncommunicative for long periods or may not display certain behaviors until transitioning from one situation to another, an expert may need to observe these children in a proposed placement for unlimited time to witness certain behaviors *in situ* and evaluate whether the placement is appropriate for the child at issue. Certainly, the School District recognized the importance of longer and meaningful observations, as it conducted several such observations in preparation for the IEP meeting. The 20 Minute Limit, a limitation applied only to parents and other "outsiders," denied Parents the same rights as the School District.[15]

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[14] Leo Kanner, *Autistic Disturbances of Affective Contact*, 2 Nervous Child 217 (1943), *reprinted in* CLASSIC READINGS IN AUTISM, at 41 (Anne M. Donnellan ed., 1985) (emphasis omitted).

[15] Notably, an ALJ in New Jersey recently excluded the school district's evidence as a sanction when the school district violated an order of the ALJ to permit the parents to, *inter alia*, have their expert visit the recommended placement for 3.5 hours as opposed to the 20 minute observation limit imposed by the school district. Pet. App. 104a-123a. The ALJ found that "[w]ith respect to the observation, the applied behavioral analysis

(Continued on following page)

IV. RESTRICTIONS ON THE PARENTS' MEANINGFUL ACCESS TO OBSERVE AND ASSESS A PROPOSED PLACEMENT SIGNIFICANTLY INFRINGES UPON PARENTS' PROCEDURAL DUE PROCESS RIGHTS IN THE WAKE OF *SCHAFFER*

The 20 Minute Limit is not only a technical violation of California Education Code § 56329, but it significantly infringes upon Parents' procedural due process rights in the wake of *Schaffer*. Under *Schaffer*, parents are required to prove that the school district has failed to provide them with a FAPE, and thus begin due process hearings with one hand tied. Accordingly, it is indispensable that parents have equivalent access to information concerning the school district's proposed placement in order to determine whether it is appropriate and to participate in the development of the IEP. The 20 Minute Limit restricts access to this information, preventing parents from adequately showing that the proposed placement was not likely to confer an educational benefit as opposed to *de minimis* results, and tying parents' other hand so that they are almost inevitably prevented from prevailing in a due process

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(ABA) therapy would likely be provided by more than one individual. Petitioners' expert would need to see these individuals provide ABA therapy, and she would also need to see the related services including speech, occupational and physical therapy. The suggestion that twenty minutes or even one hour would be sufficient for the observation is completely unrealistic in relation to the needs of the outside expert." *Id.* at 113a.

hearing. *See Rowley*, 458 U.S. at 200-201; *Houston Indep. Sch. Dist.*, ___ F.3d ___, 2009 WL 1080639 at *4. This deprivation of due process violates the letter and the spirit of the IDEA and disregards this Court's rulings with respect to procedural due process under IDEA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 14, 2009
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L. M., a minor by and through his Guardian Ad Litem, SAM M. and MARIETTE M.; SAM M., on his own behalf; MARIETTE M., on her own behalf, *Plaintiffs-Appellees*, v. CAPISTRANO UNIFIED SCHOOL DISTRICT, *Defendant-Appellant.*	No. 07-55469 D.C. No. CV-06-03049-ABC
L. M., a minor by and through his Guardian Ad Litem, SAM M. and MARIETTE M.; SAM M., on his own behalf; MARIETTE M., on her own behalf, *Plaintiffs-Appellees*, v. CAPISTRANO UNIFIED SCHOOL DISTRICT, *Defendant-Appellant.*	No. 07-55585 D.C. No. CV-06-03049-ABC

L. M., a minor by and through his Guardian Ad Litem, SAM M. and MARIETTE M.; SAM M., on his own behalf; MARIETTE M., on her own behalf,

Plaintiffs-Appellants,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

No. 07-55758

D.C. No. CV-06-03049-ABC

L. M., a minor by and through his Guardian Ad Litem, SAM M. and MARIETTE M.; SAM M., on his own behalf; MARIETTE M., on her own behalf,

Plaintiffs-Appellees,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT,

Defendant-Appellant.

No. 07-56373

D.C. No. CV-06-03049-ABC

ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California Audrey B. Collins, District Judge, Presiding

Argued and Submitted
June 3, 2008 – Pasadena, California

Filed August 19, 2008
Amended February 13, 2009

Before: Diarmuid F. O'Scannlain and
Richard C. Tallman, Circuit Judges, and
James K. Singleton,* Senior District Judge.

Opinion by Judge Tallman

COUNSEL

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Bruce E. Bothwell, Law Office of Bruce E. Bothwell, Long Beach, California, for the plaintiff-appellee/appellant.

ORDER

The Opinion filed on August 19, 2008, is AMENDED as follows:

The text following Section IV of the slip opinion appearing at pages 11021-11023, is DELETED and REPLACED with the following:

Parents challenge the district court's denial of a "stay put" order pursuant to 20 U.S.C. § 1415(j). The

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

"pendent placement" or "stay put" provision requires the child to remain in his "current educational placement" during the course of administrative and judicial proceedings. *Id.*; *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 82 (3d Cir. 1996). Section 1415(j) states:

> Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

The IDEA does not define the phrase "current educational placement." Courts have generally interpreted the phrase to mean the placement set forth in the child's last implemented IEP. *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) ("typically the placement described in the child's most recently implemented IEP"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) ("[the placement at the time of] the previously implemented IEP"); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996) ("the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked.") (internal quotation marks and citation omitted).

Alternatively, if the student has no implemented IEP because he is applying for initial admission to public school, the parents may consent to the student being placed in public school during the pendency of administrative proceedings. In that case, even if the parents disagree with the school's initial proposed placement, the public school becomes the child's "current educational placement" for purposes of a "stay put" action. *See* 20 U.S.C. § 1415(j).

L.M. does not fit into either of these common "current educational placement" categories. First, he never had an implemented IEP. The District and Parents never agreed on a placement for L.M. Second, at the time this litigation commenced, L.M. was making his initial application for public school. But rather than consenting to L.M. being placed in a public school for the duration of the litigation as provided for in § 1415(j), Parents unilaterally placed L.M. in a very expensive private program.

Therefore, Parents' only viable argument for entitlement to "stay put" is to construe the district court's March 13, 2007, reimbursement order as creating a "current educational placement" implied by law. *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearing,* 903 F.2d 635, 641 (9th Cir. 1990) (per curiam) (discussing *Sch. Comm. of the Town of Burlington v. Mass. Dep't of Educ.,* 471 U.S. 359 (1985), and concluding that "once the State educational agency decided that the parents' placement was the appropriate placement, it became the 'then current educational placement' within the meaning of

section 1415"); *see Mackey,* 386 F.3d at 163 ("'once the parents' challenge [to a proposed IEP] succeeds . . . , consent to the private placement is implied by law, and the requirements of § 1415(j) become the responsibility of the school district.'") (alterations in original) (quoting *Bd. of Educ. v. Schutz,* 290 F.3d 476, 484 (2d Cir. 2002)). Where the agency or the court has ruled on the appropriateness of the educational placement in the parents' favor, the school district is responsible for appropriate private education costs regardless of the outcome of an appeal. *Clovis,* 903 F.2d at 641.

Parents argue their private placement is L.M.'s "current educational placement" because they prevailed before the district court in their procedural challenge. *See Mackey,* 386 F.3d at 163. However, in each of the cases where a court implied a "current educational placement," the court or agency below had expressly deemed the private placement appropriate. In *Mackey,* a State Review Officer ("SRO") considered the two plans, found the public placement inappropriate, and concluded the student's needs were met at the private school the parents had chosen. 386 F.3d at 162. In *Clovis,* the administrative hearing officer explicitly found the private hospital placement was appropriate. 903 F.2d. at 639. In *Schutz,* the hearing officer made a "determination that the services selected by the parents were appropriate." 290 F.3d at 484-85.

On the basis of those findings on the merits, the reviewing courts could imply "current educational

placements" for the purpose of § 1415(j). The *Mackey* court reasoned that "[t]he regulations provide that a child's current placement may be changed upon agreement between the parents and the state, and that an SRO decision that 'agrees with the parents that a change of placement is appropriate . . . must be treated as such an agreement.'" 386 F.3d at 163 (quoting 34 C.F.R. § 300.514(a) and (c)). The court concluded Mackey's pendency placement changed "once the SRO rendered a decision." *Id.* In *Clovis,* we concluded the school district was responsible for maintaining the student in that placement "after the administrative decision that the placement was appropriate." 903 F.2d at 641. Similarly, the Second Circuit held in *Schutz* that § 1415(j) applied because the parents had successfully challenged the proposed IEP and the services chosen by the parents were appropriate. 290 F.3d at 484-85.

That did not occur here because, in reviewing the ALJ's decision, the district court found the procedural violation to be structural and ordered the specific relief requested by Parents without ever "adjudicat[ing] the appropriateness of [L.M.'s] private placement."[1] In its May 15, 2007, Order denying the

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[1] L.M. points to language in the district court's opinion indicating "the private in-home services . . . were appropriate, under the circumstances" to support his argument that the court did rule on the merits of his placement. He takes this language entirely out of context. In that section of its opinion, the district court addressed the right to reimbursement under section § 1412(a)(10)(c), which permits reimbursement if the child has

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stay put injunction, the district court reiterated that it had not ruled on the merits of L.M.'s placement.

Unlike in *Mackey*, *Clovis*, and *Schutz*, the district court here made no determination from which we can imply L.M.'s private program is his "current educational placement." Unless the district court or agency actually reaches the merits of the appropriate placement, we will not imply a "current educational placement" for purposes of § 1415(j).

Because L.M.'s private program, chosen by his parents alone, does not qualify as a "current education placement" under § 1415(j), the "stay-put" provision does not apply and the district court properly denied Parents' motion.

The panel has voted to deny the petitions for panel rehearing. Judges O'Scannlain and Tallman have voted to deny the petitions for rehearing en banc and Judge Singleton so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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received "some educational benefit." The district court deemed the private placement "appropriate under the circumstances" only in the sense that L.M. had received some educational benefit entitling Parents to reimbursement for the one year for which they actually sought relief. It has no bearing on the merits of the two programs for purposes of § 1415(j).

The petitions for panel rehearing and the petitions for rehearing en banc are denied.

No further petitions for rehearing en banc shall be entertained.

OPINION

TALLMAN, Circuit Judge:

L.M. is the autistic child of two loving parents, Samuel and Mariette (collectively "Parents"), who have spared no expense to obtain private in-home treatment for their developmentally disabled son. The local Capistrano Unified School District ("District") balked at the idea of continuing the in-home educational plan at public expense and offered an alternative plan. The matter ended up before an administrative law judge in California who conducted a four-day evidentiary hearing to resolve the dispute, ultimately ruling in favor of the District.

We must decide whether the district court clearly erred by reversing the state administrative agency's finding that a procedural violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482, amounted to harmless error. The answer depends on whether the District significantly restricted Parents' right to participate in their disabled child's Individual Educational Program ("IEP") by limiting Parents' classroom observational opportunities to twenty minutes, when the District observed the child in his private education program for up to

three hours. The district court had jurisdiction under 28 U.S.C. § 1331 and 20 U.S.C. § 1415(i)(3). We have appellate jurisdiction under 28 U.S.C. § 1291.

In reversing the administrative agency, the district court failed to properly consider whether Parents' right to participate was "significantly affected." In other words, the district court failed to consider whether the District's policy of limiting Parents' classroom observational opportunities to twenty minutes was harmless because Parents nevertheless had a full opportunity to participate in the process to fashion an appropriate educational plan for L.M. with help from an informed and knowledgeable expert. There is no evidence to support a finding that Parents' right to participate was significantly affected. We therefore reverse the district court's order requiring the District to reimburse Parents for the cost of in-home services and vacate its subsequent award of attorneys' fees to Parents as the prevailing party. We also affirm the district court's denial of a "stay put" order requiring the District to reimburse Parents for continuing education expenses beyond that covered in its original order.

I

In July 2004, a pediatric neurologist diagnosed L.M., then two and one-half years old, with autism. L.M. began receiving early intervention services from the Regional Center of Orange County in late August 2004. Through the early intervention services, L.M.

received speech-language therapy, occupational therapy, and started a one-to-one in-home behavioral program. Autism Comprehensive Educational Services ("ACES"), a non-public agency, administered L.M.'s private behavioral program. In December 2004, L.M.'s parents began paying ACES for a few additional hours of one-to-one services per week, eventually increasing his one-to-one services to twenty-five hours per week.

In November 2004, Parents met with the District's school psychologist Luisa Martinez to begin discussing L.M.'s transition to the District on his third birthday. In December and January, the District conducted several observations of L.M. during his in-home education services. On January 10, 2005, L.M.'s IEP team met to discuss L.M.'s assessment results and initial placement in the District.[1] The District offered to place L.M. in the Palisades Elementary

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[1] An IEP is a written statement developed for each disabled child by an "IEP team" that typically consists of the parents, a special education teacher, a representative of the local education agency, an expert, and when appropriate, the child. 20 U.S.C. § 1414(d); *Christoper S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1208 n.1 (9th Cir. 2004). Some of the information the IEP must contain includes: (1) information regarding the child's present levels of performance; (2) a statement of annual goals and short-term instructional objectives; (3) a statement of the special educational and related services to be provided to the child; (4) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; and (5) objective criteria for measuring the child's progress. 20 U.S.C. § 1414(d).

School, provide individual intensive behavior instruction for four hours per week, speech-language therapy for two thirty-minute sessions per week, occupational therapy for thirty minutes per week, and extended school year services. Parents attended the meeting, asked questions, but did not indicate whether they approved of the District's proposed program.

L.M. turned three-years-old on January 22, 2005, but did not begin attending school in the District. Parents continued to fund the one-to-one services provided from ACES. After the initial IEP meeting, Parents twice visited the proposed school, once with the principal and once with Dr. Melanie Lenington, a licensed psychologist. Dr. Lenington asked to observe the proposed program for a continuous ninety-minute period, but was limited to twenty-minute increments because of a district-wide policy.[2] Dr. Lenington never returned to conduct further observations after her initial twenty-minute visit.

In February and March 2005, District psychologist Martinez attempted to contact Parents to discuss the IEP offer. The Parents did not respond, and in March 2005, they filed a request for a due process hearing pursuant to 20 U.S.C. § 1415(f), alleging that

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[2] To limit classroom disruption, the District did not allow classroom observations to extend beyond twenty minutes. However, Dr. Lenington could have returned anytime for another twenty-minute observation period. She chose not to do so because of the time and expense involved in commuting to and from the school.

the proposed IEP offer denied L.M. a free appropriate public education ("FAPE").[3] In response to the due process request, on April 7, 2005, the District sent a letter to Parents offering additional services including more tutoring in the home and a formal transition plan.

In June 2005, the IEP team met for a second IEP meeting. During this meeting L.M.'s father, Samuel, asked several pointed questions regarding the research supporting the District's program. After some discussion, District staff objected to Samuel's questions because they felt interrogated. When District staff attempted to change the subject to topics specific to L.M., Samuel objected, and stated that the last two minutes of the meeting should be used to talk about

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[3] The IDEA guarantees all disabled children a FAPE, which "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The IDEA defines FAPE as

special education and related services that –

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

the District's topics. In September 2005, Parents enrolled L.M. in the Center for Autism and Related Disorders program.

The California due process hearing took place in February 2006. The hearing lasted four full days and twelve witnesses were called. During the hearing and in her subsequent Opinion, Administrative Law Judge ("ALJ") Suzanne B. Brown addressed four separate issues: (1) whether the District offered L.M. a FAPE in the least restrictive environment from January 22, 2005, through April 7, 2005; (2) whether the District offered L.M. a FAPE in the least restrictive environment from April 7, 2005, through June 7, 2005; (3) whether the District offered L.M. a FAPE in the least restrictive environment from June 7, 2005, to February 2006; and (4) whether L.M. is entitled to reimbursement for privately funded services and prospective placement with his service providers.

The ALJ concluded that the District failed to offer L.M. a FAPE from January 22, 2005, to April 7, 2005, because the District had not clearly offered thirty minutes of weekly individual speech-language therapy[4] and because the District's proposed IEP lacked a transition plan that was designed to address L.M.'s unique needs.[5] Although the District offered

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[4] Although the District offered two thirty-minute sessions of speech therapy, it did not specifically offer at least one thirty-minute session of *individual* speech-language therapy.

[5] The District did not appeal the ALJ's findings regarding these violations.

Parents an IEP with a transition plan on April 7, 2005, the new IEP still neglected to provide L.M. with the necessary thirty minutes of weekly individual speech-language therapy. Therefore, the ALJ concluded that the District also failed to offer L.M. a FAPE in the least restrictive environment from April 7, 2005, to June 7, 2005. As a result of these procedural violations, the ALJ ordered the District to reimburse Parents for the cost of providing the in-home program from January 22, 2005, to April 7, 2005. The ALJ also ordered the District to reimburse Parents for the cost of providing one hour of speech-language therapy per week from January 22, 2005, to July 22, 2005, and from the start of the 2005-2006 school year until the date of the ALJ's decision filed March 28, 2006.

The ALJ also determined that the District violated California Education Code section 56329(c)[6]

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[6] California Education Code section 56329(c) provides:

If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of free appropriate public education to the child, and may be presented as evidence at a due process hearing pursuant to Chapter 5 (commencing with Section 56500) regarding the child. If a public education agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, *an equivalent opportunity shall* apply to an independent educational assessment of the pupil in the pupil's current educational

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when it limited Dr. Lenington's classroom observation time to twenty-minute increments, but the ALJ nevertheless concluded that the procedural flaw in the development of the IEP was harmless and did not amount to the denial of a FAPE. The ALJ determined that Parents still had the opportunity to participate in the "due process hearing with an expert witness prepared to provide a knowledgeable opinion about the proposed placement." The ALJ noted that Dr. Lenington admitted during her testimony that she "was still able to develop opinions about the [Palisade program], advise the parents regarding [Palisade], and give informed testimony at the hearing regarding the [Palisade program]." Moreover, "given Dr. Dores' [(the District's expert)] extensive knowledge about the [Palisade program], [the ALJ believed that] an additional 70 minutes of Dr. Lenington's observations likely would not have significantly affected the weight given to her testimony regarding the appropriateness of the [Palisade program]."

Ultimately, the ALJ did not find a procedural or substantive violation of the IDEA that would allow Parents to receive reimbursement of the costs of in-home care after April 7, 2005. The ALJ also declined

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> placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding.

(Emphasis added.)

to find that L.M. is entitled to prospective placement with his current providers since she determined that the District's proposed IEP amounted to a substantively viable FAPE.

Parents challenged the ALJ's decision to the United States District Court for the Central District of California. Primarily at issue in this appeal is whether the district court clearly erred in reversing the ALJ's finding of harmlessness with regards to the District's technical violation of section 56329(c). The district court concluded that the limitation amounted to more than a "mere technical violation" since it "constitute[d] a procedural violation of the IDEA by depriving [Parents] of the right to meaningfully participate in the IEP process." By limiting Dr. Lenington's ability to observe the Palisades program, the District "frustrated the *purpose* of Cal. Edu. Code § 56329 by denying [Parents] the opportunity to gather evidence regarding the appropriateness [of] placing [L.M.] at Palisades." The district court ordered the District to reimburse Parents for the cost of all in-home services received between January 22, 2005, until the date the District properly prepared an IEP. The district court remanded the case to the ALJ for a determination on the reimbursement amount. The District timely appealed.[7]

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[7] Including attorneys' fees, the District was ultimately ordered to pay approximately $215,000 to Parents. In appeal No. 07-55585 and No. 07-56373, the District appeals the district court's award of attorneys' fees.

II

A party aggrieved by the findings and decision of an ALJ in a due process hearing may seek review through a civil action in United States district court. 20 U.S.C. § 1415(i)(2). The IDEA provides that in reviewing a due process hearing, the district court:

> [1] shall receive the records of the administrative proceedings;
>
> [2] shall hear additional evidence at the request of a party; and
>
> [3] basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate.

20 U.S.C. § 1415(i)(2)(C).

In reviewing administrative decisions, the district court must give "due weight" to the state's judgments of education policy. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982); *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996). In recognition of the administrative agency's expertise, the court "must consider [the agency's] findings carefully and endeavor to respond to the hearing officer's resolution of each material issue." *County of San Diego*, 93 F.3d at 1466 (internal quotation marks omitted). Although the district court "is free to determine independently how much weight to give the administrative findings" the "courts are not permitted simply to ignore [them]." *Id.* (internal

quotation marks omitted). A district court shall accord more deference to administrative agency findings that it considers "thorough and careful." *Capistrano Unified Sch. Dist. v. Wartenberg,* 59 F.3d 884, 892 (9th Cir. 1995). The ALJ's twenty-page Opinion certainly meets that standard in our judgment. We review for clear error a district court's findings of fact in an IDEA case. *Id.*

III

[1] The IDEA assures that all disabled children receive a FAPE through IEPs. 20 U.S.C. § 1400(d)(1)(A). As a part of their FAPE, the IDEA guarantees certain procedural safeguards for the disabled child and his or her parents. 20 U.S.C. § 1415(a); *W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23,* 960 F.2d 1479, 1483 (9th Cir. 1992) ("*Target Range*"), 1771 *superseded by statute on other grounds by* Individuals with Disability Education Act Amendments of 1997, Pub. L. 105-17, § 614(d)(1)(B), 111 Stat. 37. "Central among the safeguards is the process of developing an [IEP] for each child." *Id.* (citing 20 U.S.C. §§ 1401(a)(18)(D), 1412(1)); *see also Rowley,* 458 U.S. at 181 (stating that in reviewing an IDEA case, a court must first determine whether "the State complied with the procedures set forth in the Act").

[2] Procedural flaws in the IEP process do not always amount to the denial of a FAPE. *Target Range,* 960 F.2d at 1484; *see also M.L. v. Federal Way*

Sch. Dist., 394 F.3d 634, 652 (9th Cir. 2005) (plurality) (Gould, J., concurring) (citing 28 U.S.C. § 2111). Once we find a procedural violation of the IDEA, we must determine whether that violation affected the substantive rights of the parent or child. *M.L.*, 394 F.3d at 652 (Gould, J., concurring); *Target Range*, 960 F.2d at 1484; *see also Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1079-80 (9th Cir. 2003), *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B) (2003); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 891-92 (9th Cir. 2001). "[P]rocedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." *Target Range*, 960 F.2d at 1484 (citations omitted). Here, Parents do not contend that by limiting Dr. Lenington's ability to observe, the District caused "a lost educational opportunity." Therefore, we are concerned only with whether the procedural violation "significantly restricted" Parents' participation in the IEP process. *See M.L.*, 394 F.3d at 653 (Gould, J., concurring); *Target Range*, 960 F.2d at 1484.

[3] California Education Code section 56329(c) provides that "[i]f a public education agency observed the pupil in conducting its assessment . . . *an equivalent opportunity* shall apply to an independent educational assessment" for the parents with regards to observation of the proposed educational placement and setting. The purpose of section 56329(c) is to level

the playing field between the parents and a more knowledgeable school district. *Benjamin G. v. Special Educ. Hearing Office,* 131 Cal. App. 4th 875, 881 (Cal. Ct. App. 2005). "IDEA acknowledges the fact that school districts have better access to information and more educational expertise than parents and thus provides for a 'due process' hearing to 'level the playing field' by permitting the parents to present all the evidence they can muster to challenge the district's decision." *Id.* "To that end, IDEA gives the child and his parents the right to be advised by experts, to have those experts testify at their due process hearing, and to have someone other than a district employee as a hearing officer." *Id.*

The ALJ concluded that the District's time limitation, while a violation of California Education Code section 56329(c), did not so undermine the statute's purpose as to deprive Parents of their right to participate in the due process hearing with an independent, knowledgeable expert. Indeed, as Dr. Lenington testified, even with the time limitation, she was still able to develop opinions, advise Parents, and give informed testimony at the hearing. Having heard all of the live testimony, and having concluded that the District's expert – who had extensive knowledge about the Palisade program – was more credible, the ALJ concluded that an additional seventy minutes of observation "likely would not have significantly affected the weight" she gave to Dr. Lenington's testimony.

Despite concluding that the ALJ's careful and thorough opinion deserved "substantial deference," the district court rejected the ALJ's assessment and held that the District's procedural violation deprived Parents of their right to "meaningfully participate in the IEP process." Relying on *Benjamin G.*, the district court held that the District "not only technically violated [section 56329]," it "also frustrated the purpose of [that section] by denying [Parents] the opportunity to gather evidence regarding the appropriateness [of] placing [L.M.] at Palisades." According to the district court, this arose to more than a "mere technical violation" because some of the most important procedural safeguards are those that protect a parent's right to participate. The district court also noted that the ALJ concluded Dr. Lenington was "'not particularly familiar with [Palisades] or other components of the District's program, and thus [her] testimony regarding the District's program carried less weight than that of [the District's expert] Dr. Dores, who helped to design the program and continues to supervise it.'" Although the district court did not disagree with the ALJ's assessment of the knowledge and credibility of the witnesses, it disagreed with the ALJ's conclusion that the procedural violation did not deprive Parents of their right to "meaningfully participate in the IEP process."

[4] The district court misconstrued the ALJ's findings, and in doing so, it failed to properly apply the harmless error analysis required by our precedent. Not all procedural flaws result in the denial of

a FAPE. We have never adopted as precedent the structural defect approach discussed by Judge Alarcón in *M.L. v. Federal Way School District,* 394 F.3d 634 (9th Cir. 2005) (plurality). *See id.* at 652-53 (Gould, J., concurring). Our precedent is clear: a procedural violation may be harmless, and we must consider whether the procedural error either resulted in a loss of educational opportunity or significantly restricted parental participation. *Id.; Shapiro,* 317 F.3d at 1079-80; *Amanda J.,* 267 F.3d at 891-92; *Target Range,* 960 F.2d at 1484.

[5] Although the district court properly recognized that Parents have a substantial right to participate in the IEP process, it neglected to consider whether Parents' right was *significantly affected* by the District's procedural violation. In an action for judicial review of an administrative decision, the burden of persuasion rests with the party challenging the ALJ's decision. *Clyde K. v. Puyallup Sch. Dist., No. 3,* 35 F.3d 1396, 1399 (9th Cir. 1994), *superseded on other grounds as recognized in M.L.,* 341 F.3d at 1063 n.7. Parents fail to present any evidence that undermines the ALJ's credibility findings, or proffer any evidence that they could have found had they received more classroom observation time. Dr. Lenington could have gone back on other occasions for more twenty-minute visits. Dr. Lenington also conceded that she was able to provide Parents with an informed and independent opinion, and Parents presented the opinion of Dr. Lenington during the due process hearing. Having heard all of the testimony,

the ALJ determined that there was likely nothing Dr. Lenington could have discovered during an additional seventy minutes of observation time that would have changed the ALJ's ultimate opinion that placement in Palisade was appropriate for L.M. Because we conclude that there is nothing in the record to support a finding that the procedural flaw during the development of L.M.'s IEP deprived Parents of their right to meaningfully participate in the due process hearing, we conclude that the district court's finding to the contrary was clearly erroneous.[8]

IV

[6] Parents challenge the district court's denial of a "stay put" order pursuant to 20 U.S.C. § 1415(j). The "pendent placement" or "stay put" provision requires the child to remain in his "current educational placement" during the course of administrative and judicial proceedings. *Id.*; *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 82 (3d Cir. 1996). Section 1415(j) states:

> Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child

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[8] Because we reverse the district court's underlying order granting Parents reimbursement for a procedural violation, we vacate the order granting Parents attorneys' fees as the prevailing party (Nos. 07-55585/07-56373).

> shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

[7] The IDEA does not define the phrase "current educational placement." Courts have generally interpreted the phrase to mean the placement set forth in the child's last implemented IEP. *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) ("typically the placement described in the child's most recently implemented IEP"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) ("[the placement at the time of] the previously implemented IEP"); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996) ("the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked.") (internal quotation marks and citation omitted).

[8] Alternatively, if the student has no implemented IEP because he is applying for initial admission to public school, the parents may consent to the student being placed in public school during the pendency of administrative proceedings. In that case, even if the parents disagree with the school's initial proposed placement, the public school becomes the child's "current educational placement" for purposes of a "stay put" action. *See* 20 U.S.C. § 1415(j).

[9] L.M. does not fit into either of these common "current educational placement" categories. First, he never had an implemented IEP. The District and Parents never agreed on a placement for L.M. Second, at the time this litigation commenced, L.M. was making his initial application for public school. But rather than consenting to L.M. being placed in a public school for the duration of the litigation as provided for in § 1415(j), Parents unilaterally placed L.M. in a very expensive private program.

Therefore, Parents' only viable argument for entitlement to "stay put" is to construe the district court's March 13, 2007, reimbursement order as creating a "current educational placement" implied by law. *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings,* 903 F.2d 635, 641 (9th Cir. 1990) (per curiam) (discussing *Sch. Comm. of the Town of Burlington v. Mass. Dep't of Educ.,* 471 U.S. 359 (1985), and concluding that "once the State educational agency decided that the parents' placement was the appropriate placement, it became the 'then current educational placement' within the meaning of section 1415"); *see Mackey,* 386 F.3d at 163 ("'once the parents' challenge [to a proposed IEP] succeeds . . . , consent to the private placement is implied by law, and the requirements of § 1415(j) become the responsibility of the school district.'") (alterations in original) (quoting *Bd. of Educ. v. Schutz,* 290 F.3d 476, 484 (2d Cir. 2002)). Where the agency or the court has ruled on the appropriateness of the educational placement in the parents' favor, the school district is

responsible for appropriate private education costs regardless of the outcome of an appeal. *Clovis,* 903 F.2d at 641.

[10] Parents argue their private placement is L.M.'s "current educational placement" because they prevailed before the district court in their procedural challenge. *See Mackey,* 386 F.3d at 163. However, in each of the cases where a court implied a "current educational placement," the court or agency below had expressly deemed the private placement appropriate. In *Mackey,* a State Review Officer ("SRO") considered the two plans, found the public placement inappropriate, and concluded the student's needs were met at the private school the parents had chosen. 386 F.3d at 162. In *Clovis,* the administrative hearing officer explicitly found the private hospital placement was appropriate. 903 F.2d. at 639. In *Schutz,* the hearing officer made a "determination that the services selected by the parents were appropriate." 290 F.3d at 484-85.

On the basis of those findings on the merits, the reviewing courts could imply "current educational placements" for the purpose of § 1415(j). The *Mackey* court reasoned that "[t]he regulations provide that a child's current placement may be changed upon agreement between the parents and the state, and that an SRO decision that 'agrees with the parents that a change of placement is appropriate . . . must be treated as such an agreement.'" 386 F.3d at 163 (quoting 34 C.F.R. § 300.514(a) and (c)). The court concluded Mackey's pendency placement changed

"once the SRO rendered a decision." *Id.* In *Clovis,* we concluded the school district was responsible for maintaining the student in that placement "after the administrative decision that the placement was appropriate." 903 F.2d at 641. Similarly, the Second Circuit held in *Schutz* that § 1415(j) applied because the parents had successfully challenged the proposed IEP and the services chosen by the parents were appropriate. 290 F.3d at 484-85.

[11] That did not occur here because, in reviewing the ALJ's decision, the district court found the procedural violation to be structural and ordered the specific relief requested by Parents without ever "adjudicat[ing] the appropriateness of [L.M.'s] private placement."[9] In its May 15, 2007, Order denying the stay put injunction, the district court reiterated that it had not ruled on the merits of L.M.'s placement.

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[9] L.M. points to language in the district court's opinion indicating "the private in-home services . . . were appropriate, under the circumstances" to support his argument that the court did rule on the merits of his placement. He takes this language entirely out of context. In that section of its opinion, the district court addressed the right to reimbursement under section § 1412(a)(10)(c), which permits reimbursement if the child has received "some educational benefit." The district court deemed the private placement "appropriate under the circumstances" only in the sense that L.M. had received some educational benefit entitling Parents to reimbursement for the one year for which they actually sought relief. It has no bearing on the merits of the two programs for purposes of § 1415(j).

[12] Unlike in *Mackey, Clovis*, and *Schutz*, the district court here made no determination from which we can imply L.M.'s private program is his "current educational placement." Unless the district court or agency actually reaches the merits of the appropriate placement, we will not imply a "current educational placement" for purposes of § 1415(j).

[13] Because L.M.'s private program, chosen by his parents alone, does not qualify as a "current education placement" under § 1415(j), the "stay-put" provision does not apply and the district court properly denied Parents' motion.

V

The district court neglected to give the ALJ's careful and thorough assessment of the harmlessness of the District's procedural violation the substantial deference it deserved. Parents participated in the due process hearing with an informed, knowledgeable, independent expert. There is nothing in the record to suggest that an additional seventy minutes of continuous observation time would have provided any information that would have undermined the ALJ's credibility findings. Because the district court failed to consider whether Parents' substantial rights were significantly affected, and because there is nothing in the record to support a conclusion that they were, we conclude that the district court's factual findings were clearly erroneous. We reverse the district court's reimbursement order (No. 07-55469) and vacate its

award of attorneys' fees (Nos. 07-55585/07-56373). We affirm the district court's denial of a "stay put" order (No. 07-55758). Each party shall bear its own costs on appeal.

REVERSED (No. 07-55469); VACATED (Nos. 07-55585/07-56373); AFFIRMED (No. 07-55758).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-3049 ABC (JCx) Date May 15, 2007

Title *L.M., a minor, et al. v. Capistrano Unified School District*

Present: The Honorable Audrey B. Collins

[Illegible] Daphne Alex	Not Present	N/A
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: Plaintiff's Motion to Determine "Stay Put" Placement (In Chambers)

On April 30, 2007, Plaintiff L.M., a minor, via his guardians ad litem Sam M. and Mariette M. (collectively, "Plaintiffs") filed the above-referenced motion seeking a "stay put" order from the Court pending Defendant Capistrano Unified School district's ("Defendant's") appeal of an Order issued by the Court on March 13, 2007. Defendant opposed the motion on May 7, 2007, and Plaintiffs replied on May 14, 2007. The matter is currently set for a hearing on May 21, 2007, but the Court finds that it is appropriate for decision without oral argument and hereby vacates the May 21, 2007 hearing date. *See* Fed. R. Civ. P. 78;

Local Rule 7-15. After consideration of the materials submitted by the parties and the case file, the Court hereby DENIES Plaintiff's motion.

The facts underlying Plaintiff's case are set forth in detail in the Court's March 13, 2007 Order. By way of brief background, this case arises from a dispute regarding the provision of educational services to a disabled child, Plaintiff L.M. Plaintiffs sued Defendant for alleged violations of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* ("IDEA"). Plaintiffs' claims were initially heard in a due process hearing conducted by the California Office of Administrative Hearings, Special Education Division on February 7th through 10th, 2006. Following the administrative hearing, Administrative Law Judge Suzanne B. Brown ("ALJ Brown") issued a lengthy decision ("ALJ Decision"). On November 6, 2006, Plaintiffs filed a motion with the Court, claiming that in the ALJ Decision, ALJ Brown made various procedural and substantive errors. Defendants opposed this motion on December 4, 2006, and Plaintiffs replied on December 15, 2006.

In that motion, Plaintiffs challenged the ALJ Decision on both procedural and substantive grounds. However, Plaintiffs only sought from the Court reimbursement of all privately funded educational expenses incurred from the date of Plaintiff L.M.'s third birthday, January 22, 2005, to the date his next annual IEP was convened. Defendant asserted that the ALJ Decision should be upheld in its entirety. In its March 13, 2006 Order, the Court largely upheld

the ALJ Decision but found that Plaintiffs were denied the right to meaningfully participate in the IEP process due to the time limitations placed on the observations of Plaintiff L.M. by a licensed psychologist brought into the District by Plaintiffs. (March 13, 2007 Order at 15:7-14.) As a result, the Court reversed the ALJ's decision in part and remanded the matter to the California Office of Administrative Hearings, Special Education Division, "to determine the appropriate amount of reimbursement due to Plaintiffs for all privately funded educational expenses incurred between the date of Plaintiff L.M.'s third birthday ([Date Of Birth Omitted]) to the date of his next annual IEP," which was May 5, 2006. (*Id.* at 15:18-16:3.) In the Order, the Court specifically noted that, though Plaintiffs expanded their requested relief in their reply briefing, the Court declined to consider these new requests, limiting its Order to Plaintiffs's [sic] initial request, "for reimbursement." (*Id.* at 15 n.2.)

On April 2, 2007, Defendant appealed the Court's March 13, 2007 Order to the United States Court of Appeals for the Ninth Circuit. On April 30, 2007, Plaintiffs filed the instant motion for a so-called "stay put" order under Section 1415(j) of Individuals with Disabilities Education Act, 20 U.S.C. §§1400, *et seq.* ("IDEA"). Section 1415(j) states:

> Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local agency and the parents otherwise agree,

> the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j). This provision has been characterized as automatic, substituting "an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either likelihood of success on the merits or a fair ground for litigation and a balance of hardships." *See Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982). "Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief." *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996). "The relevant inquiry under [former section 1415(j)] thus becomes the identification of 'the then current educational placement,' of the handicapped student and, further, the identification of who should pay for it." *Id.* at 865.

Plaintiff argues that a "stay put" order should be automatically granted because Plaintiffs' funds to continue paying for private placement will be exhausted in several months, thereby forcing them "to place [L.M.] in Defendant's program" pending an appeal of the court's Order. (Pl. Mot. at 8:16-17.) If the Court does not force Defendant to pay for Plaintiffs' current private placement during the appeal process, Plaintiffs argue, "the Defendant will have

accomplished as a practical matter what it could not otherwise properly accomplish, namely L.M.'s placement in a District special education classroom." (*Id.* at 8:18-20.)

Defendant counters that this provision does not apply to the Court's March 13, 2007 Order because it did not involve a "currently relevant" placement or offer of placement, only the right to reimbursement for "all privately funded educational expenses incurred between the date of Plaintiff L.M.'s third birthday ([Date Of Birth Omitted]) to the date of his next annual IEP." Defendant also points out that Plaintiffs omitted a crucial fact in their motion. In addition to the May 5, 2006 IEP that marked the end of the reimbursement period in the Court's Order, Defendant conducted another IEP on February 8, 2007. (Opp. at 6:15-18.) Plaintiffs have not challenged either of these more recent IEPs, so Plaintiffs' current challenge is not directed to a "currently relevant" placement that requires a "stay put" order under Section 1415(j). Moreover, Defendant argues, even if the intervening IEPs could be challenged, Plaintiffs have not proceeded through the administrative process prior to seeking relief from this Court.

Defendants are correct that Section 1415(j) does not apply to Plaintiffs' case. As the Second Circuit explained, "[u]nder the statute, the inquiry focuses on identifying 'the then current educational placement' and further, on who should pay for it, for implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational

placement made by the agency and consented to by the parent before the parent requested a due process hearing." *Zvi D.*, 694 F.2d at 906. In *Zvi D.*, the parents transferred the plaintiff-student from one private school to another, then sought to review of his placement by the New York City Board of Education to determine if they were eligible for public funding of the private placement. The Board of Education evaluated the student and recommended a free appropriate public education ("FAPE") placement, which the parents challenged. The Board postponed further evaluation in favor of funding the student's private placement for the following school year only and both parties specifically agreed that the arrangement was a stipulation for a postponement only.

The Board reevaluated the student and made another recommendation, which the parents then challenged, and an Impartial Hearing Officer determined that the evaluation was procedurally improper because the Board failed to have a physician present at the IEP meeting. The Hearing Officer Ordered the Board to pay *for the student's private placement for the school year*, and ordered another reevaluation, which the parents again challenged. During the pendency of this process, the student attended a private placement.

The parents sought an order enjoining the board to fund the student's private education. The court rejected the parents' contention, holding that, for the purposes of Section 1415(j) (formerly Section 1415(e)(3)), there was no "then current placement." The court

reasoned that neither the board's stipulation nor the Hearing Officer's decision was a placement by the agency or was a determination that the student's private education placement was appropriate. Rather, "the status quo provision would apply if the Board of Education's Committee on the Handicapped and previously agreed to, or had been ordered to provide private school placement." *Id.* at 908. The Hearing Officer ordered only reimbursement for prior private school expenses, and "[p]ayment and placement are two different matters." *Id.*

This case falls within the reasoning in *Zvi D.* A stay-put order is inappropriate because there is no "then current placement" that the Court can order to be maintained. The court's Order involved only reimbursement for a prior period of time and made no effort to adjudicate the propriety of the private placement going forward. In the briefing on their appeal of the ALJ Decision, Plaintiffs specifically and unequivocally limited their requested relief to ordering Defendant "to reimburse the Plaintiff parents for all privately funded educational expenses incurred from the date of L.M.'s third birthday, [Date Of Birth Omitted], to the date his next annual IEP was convened." (Pl. Trial Br. at 25:19-22.) The Court addressed that very question, found a procedural violation in Defendant's IEP and ordered the specific relief requested by Plaintiffs. Plaintiffs did not, at any time, request a placement in L.M.'s private program as an IEP or an adjudication of the appropriateness of L.M.'s private placement on a going-forward basis.

Neither ALJ Brown nor the Court ordered L.M.'s continued participation in the private program or adjudicated the appropriateness of L.M.'s private placement. At all times, the adjudication of this case has been focused only on reimbursement for the limited time period requested by Plaintiffs. Therefore, like in *Zvi D.*, L.M. has no "then current placement" over which the Court can issue a stay put order to require Defendant to continue to fund Plaintiffs' private placement. *See also Mayo v. Baltimore City Public Sch.*, 40 F. Supp. 2d 331 (D. Md. 1999) (declining to enter a stay put order for private placement reimbursement because there was no "then current placement").

Two other cases discussed by the parties are distinguishable from the current matter. First, in *Clovis Unified School District v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990), the Court faced the question of "whether the 'stay put' provisions required [the school district] to maintain the child in [the private placement] throughout the course of the court review proceedings which followed *the agency decision that* [*the private placement*] *was the appropriate placement.*" *Id.* at 640 (emphasis added). The Court determined that the stay put order was appropriate.

Similarly, in *Susquenita School District v. Raelee S.*, 96 F.3d 78 (3d Cir. 1996), the school district issued an IEP prior to the start of the school year, which the student's parents rejected, opting instead to place the student in private school and challenge the IEP. A

three-member state special education appeals panel found the IEP deficient and upheld the private placement, recognizing that [p]arents have a right to withdraw their children from public school unilaterally . . . and receive reimbursement for private school tuition when a district has failed to provide an appropriate education and *when the private school meets the substantive requirements of IDEA . . .* " *Id.* at 80 (emphasis added). On appeal, the district court denied the school district's request for a stay put order relieving it of the obligation to reimburse the student for the private placement. The Second Circuit affirmed, reasoning that when the state appellate panel ruled in the student's favor *that the private placement was appropriate*, that established the "pendent placement" for the purposes of the stay put order going forward.

The decisions in *Clovis* and *Susquenita* rested on either a prior adjudication that placed the students in a private placement or on a prior adjudication that the current private placement was appropriate as the continuing placement during the pendency of the proceedings. As discussed above, there has been no similar adjudication in this case, and, as a result, there is no "then current placement" for the purpose of the stay put provision. The discussion in these cases over who should pay for the private placement *following either an administrative or court adjudication of that private placement on a going-forward*

basis, is inapplicable and neither *Clovis* nor *Susquenita* is controlling in this case.[1]

Even if the Court were inclined to grant Plaintiffs' stay put request, "the dispositive factor in decision a child's 'current educational placement' [for purposes of a stay put order] should be the Individualized Education Program . . . actually functioning when the stay put is invoked." *Drinker*, 78 F.3d at 868. There has been no adjudication that Plaintiffs' private placement is a valid IEP, as outlined above, and Plaintiffs have not yet challenged the February 8, 2007 IEP. This renders the February 8, 2007 IEP the one "actually functioning when the stay-put is invoked."

Finally, even though Section 1415(j) does not apply to Plaintiffs' case, "[t]he trial court retains the inherent power during the pendency of an appeal to act to preserve the status quo to ensure the effectiveness of the eventual judgment." *Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 883 (E.D. Cal. 2004); *see also Nat. Resources Defense Council, Inc. v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) ("The district court retains jurisdiction during the pendency of an appeal to act to preserve the

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[1] *School Committee of the Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359 (1985) is also distinguishable on this basis. The Court's opinion makes clear that the administrative appeals panel found that the private placement was "'the least restrictive adequate program within the record' for [the student's] educational needs." *Id.* at 363.

status quo."); Fed. R. Civ. Proc. 62(c). In light of the discussion above, the Court DENIES Plaintiffs' request for a stay on this basis. The Plaintiffs specifically sought only reimbursement between the date of L.M.'s third birthday and his next annual IEP. The Court's jurisdiction only extends so far as to enjoin Defendant from taking any action that might jeopardize the Court's reimbursement order or Defendant's practical ability to reimburse Plaintiffs for these expenses. Plaintiffs seek an order requiring Defendant to reimburse Plaintiffs for expenses outside this time period and for amounts the Court did not order Defendant to pay originally. Therefore, the Court does not have jurisdiction to enter the stay requested by Plaintiffs pursuant to its inherent power to maintain the status quo pending appeal, and it need not address the traditional factors to determine whether a stay is warranted.

The Court hereby DENIES Plaintiffs' Motion to Determine "Stay Put" Placement.

IT IS SO ORDERED.

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Initials of Preparer

/s/ [Illegible] for DA

L.M., a minor, by and through his Guardians ad litem, SAM M. AND MARIETTE M.; SAM M. On his own behalf, and MARIETTE M. on her own behalf, Plaintiffs, v. CAPISTRANO UNIFIED SCHOOL DISTRICT, Defendant.

CV 06-3049 ABC (JCx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

2007 U.S. Dist. LEXIS 97057

March 13, 2007, Decided

March 13, 2007, Filed

COUNSEL: [*1] For L. M., a minor, Guardian Ad Litem Sam M., Guardian Ad Litem Mariette M., Sam M., on his own behalf, Mariette M., on her own behalf, Plaintiffs: Bruce E Bothwell, LEAD ATTORNEY, Bruce E Bothwell Law Offices, Long Beach, CA.

For Capistrano Unified School District, Defendant: Lyndsy B Rutherford, LEAD ATTORNEY, S Daniel Harbottle, LEAD ATTORNEY, Rutan and Tucker, Costa Mesa, CA.

JUDGES: AUDREY B. COLLINS, UNITED STATES DISTRICT JUDGE.

OPINION BY: AUDREY B. COLLINS

OPINION

ORDER RE: APPEAL OF ADMINISTRATIVE DECISION DATED MARCH 28, 2006

This case arises from a dispute regarding the provision of education services to a disabled child, Plaintiff L.M. Plaintiff L.M., via his guardians ad litem Sam M. and Mariette M. (collectively, "Plaintiffs"), have sued the Capistrano Unified School District ("Defendant") for alleged violations of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA"). Plaintiffs' claims were initially heard in a due process hearing conducted by the California Office of Administrative Hearings, Special Education Division on February 7th through 10th, 2006. Following the administrative hearing, Administrative Law Judge Suzanne B. Brown ("ALJ Brown") issued a lengthy decision [*2] ("ALJ Decision"). Plaintiffs contest the outcome of the hearing, arguing various procedural and substantive violations of the IDEA. Plaintiffs filed their trial brief on November 6, 2006, Defendant opposed on December 4, 2006, and Plaintiffs replied on December 15, 2006.

I. LEGAL STANDARD

A. The IDEA.

The IDEA, guarantees all disabled children a "free appropriate public education" ("FAPE") which "emphasizes special education and related services designed to meet their unique needs and prepare

them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). A FAPE is defined as special education and related services that: (1) are available to the student at public expense, under public supervision and direction, and without charge; (2) meet the state education standards; (3) include an appropriate education in the state involved; and (4) conform with the student's Individualized Education Program ("IEP"). 20 U.S.C. §1401(9).

An IEP is a written statement containing the details of the individualized education program for a specific child, which is crafted by a team that includes the child's parents and teacher, a representative of the local education agency, and, [*3] whenever appropriate, the child. 20 U.S.C. §1401(14), §1414(d)(1)(B). An IEP must contain: (1) information regarding the child's present levels of performance; (2) a statement of annual goals and short-term instructional objectives; (3) a statement of the special educational and related services to be provided to the child; (4) an explanation of the extent to which the child will not participate with non-disabled children in the regular class; and (5) objective criteria for measuring the child's progress. 20 U.S.C. §1414(d).

In addition to these substantive provisions, the IDEA contains numerous procedural safeguards. The local educational agency must provide the parents or guardians of a disabled child prior written notice of any proposed change in the identification, evaluation, or educational placement of the child. 20 U.S.C. §1415(b)(3). The agency also must give parents an

opportunity to present complaints regarding any matter related to the education or placement of the child, or the provision of a FAPE to the child. 20 U.S.C. §1415(b)(6). Upon the presentation of such a complaint, the parent or guardian is entitled to an impartial due process administrative hearing conducted [*4] by the state or local educational agency, as determined by state law or by the state educational agency.

B. Judicial Review of Administrative Decisions Under the IDEA.

The IDEA provides that a party aggrieved by the findings and decision made in a state administrative due process hearing has the right to bring an original civil action in federal district court (or, in a state court of competent jurisdiction) in order to secure review of the disputed findings and/or decision. 20 U.S.C. §1415(i)(2). The party challenging the decision bears the burden of persuasion on its claim. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994) (superseded by statute on other grounds).

The standard for district court review of an administrative decision under the IDEA is set forth in 20 U.S.C. §1415(i)(2), which provides as follows:

> "In any action brought under this paragraph the court – (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the

> preponderance of the evidence, shall grant such relief as the court determines is appropriate."

This standard requires that "due [*5] weight" be given to the administrative proceedings. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The amount of deference accorded is subject to the court's discretion. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987). In making this determination, the thoroughness of the hearing officer's findings should be considered, and the degree of deference increased where the hearing officer's findings are "thorough and careful." *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 892 (9th Cir. 1995) (citing *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). "Substantial weight" is given to the hearing officer's decision where it "evidences his careful, impartial consideration of all the evidence and demonstrates his sensitivity to the complexity of the issues presented." *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996) (internal citations omitted). This high degree of deference is warranted because "if the district court tried the case anew, the work of the hearing officer would not receive 'due weight' and would be largely wasted." *Capistrano*, 59 F.3d at 891.

Because [*6] of the deference to be accorded to the hearing officer's decision, a de novo review is not appropriate. *Amanda J. v. Clark County Sch. Dist.*,

267 F.3d 877, 887 (9th Cir. 2001). Thus, the district court must make an independent judgment based on a preponderance of the evidence and giving due weight to the hearing officer's determination. *Capistrano*, 59 F.3d at 892. After making such a finding, the district court may accept or reject the hearing officer's findings in whole or in part. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1473 (9th Cir 1993).

In this case the hearing officer, ALJ Brown issued a lengthy, detailed opinion. She supported her findings with testimony and documentary evidence presented by the parties during the hearing. ALJ Brown's decision was impartial, and her reasoning reflected her detailed understanding of the complexities of the case. Thus, her decision is entitled to substantial weight.

II. FACTUAL BACKGROUND

Plaintiff L.M. was diagnosed with autism in July 2004 when he was two and one half years old. He consequently suffers from deficits in communication, self-help, social and play skills. He also displays maladaptive behaviors in the form of non-compliance, [*7] inattention, and tantruming as well as perseverative and self-stimulatory behaviors. As a child with disabilities who resides within the boundaries of Defendant school district, Plaintiff L.M. is entitled to special education and related services in accordance with IDEA.

Prior to Plaintiffs' initial IEP meetings on January 10 and 22, 2005, Plaintiff L.M. was receiving 25-30 hours per week of intensive services in his home. The services were first provided by Autism Comprehensive Educational services ("ACES"), and were paid for in part by Plaintiff L.M.'s parents. When an opening became available in September 2005, Plaintiff L.M. was placed with the Center for Autism and Related Disorders ("CARD"). The CARD services were also provided in Plaintiff L.M.'s home, and were paid for by Plaintiff L.M.'s parents.

As a result of the January 2005 IEP, the Defendant offered Plaintiff L.M. a placement at Palisades Elementary School ("Palisades") in a "structured autism" program, as well as individual intensive behavioral instruction for four hours per week, speech and language therapy, and other services. (ALJ Decision, p.3, P5).

Plaintiff L.M.'s parents visited Palisades twice, once accompanied [*8] by the Palisades principal, and once accompanied by Dr. Melanie Lenington ("Dr. Lenington"). (ALJ Decision, p.4, P6). Dr. Lenington is a licensed psychologist who was conducting an independent assessment of Plaintiff L.M. (*Id.*). Dr. Lenington expressed a desire to conduct 90 minutes of observation at Palisades. However, the observation was limited to 20 minutes pursuant to district-wide policy. (*Id.*) Due to logistical issues, Dr. Lenington did not return to Palisades to conduct any further observation. (*Id.*).

Following the January 2005 IEP, Plaintiff L.M.'s parents did not inform the Defendant of their decision regarding the Defendant's placement offer, and Plaintiff L.M. did not enroll in the services offered by Defendant. (ALJ Decision, pp.3-4, PP15-7). Rather, in March 2005, Plaintiffs filed a request for a due process hearing, alleging that the Defendant's January 2005 IEP offer denied Plaintiffs a FAPE. (ALJ Decision, p.4, P7).

Following Plaintiffs' request for a due process hearing, Defendant wrote a letter to Plaintiff L.M.'s parents reiterating the District's January 2005 IEP offer, and offering additional services in response to specific concerns raised by Plaintiffs in the [*9] due process hearing request. (ALJ Decision, p.4, P8). The additional services included a "transition plan" geared toward assisting Plaintiff L.M. with the transition from his in-home services to enrollment in the Palisades Elementary School program. (*Id.*).

In May 2005, Plaintiff L.M.'s parents requested another IEP meeting to discuss the Defendant's offer. The meeting was convened on June 7, 2005. However, during the meeting a dispute arose between Plaintiff L.M.'s Father and the members of Defendant's IEP team. As a result, at the end of the meeting the IEP team members gave Plaintiff L.M.'s Father a copy of Defendant's "Civility Policy." (ALJ Decision, p.5, P9). Following the meeting, Defendant's most recent IEP offer was again provided to Plaintiffs in a June 13, 2005 letter. (*Id.*).

Following the June 2005 IEP, Plaintiff L.M. continued to receive in-home services through ACES (and beginning in September 2005, through CARD), paid for by his parents. (ALJ Decision, p.5, PP19-11). Thus, at the time of the administrative hearing in this matter, Plaintiff L.M. was receiving approximately 36 hours per week of intensive one-on-one CARD services in his home, paid for by his parents, as [*10] well as speech and language therapy services from The Speech, Language and Learning Center.

At the administrative hearing, ALJ Brown heard testimony from witnesses for both Plaintiffs and Defendant, including several experts in autism, speech and language pathology, and psychology. In the ALJ Decision, ALJ Brown addressed four issues: (1) whether Defendant offered Plaintiffs a FAPE in the least restrictive environment ("LRE") from January 22, 2005 through April 7, 2005; (2) whether Defendant offered Plaintiffs a FAPE in the LRE from April 7, 2005 through June 7, 2005; (3) whether Defendant offered Plaintiffs a FAPE in the LRE from June 7, 2005 to February 2006; and (4) whether Plaintiffs are entitled to reimbursement for privately funded services and prospective placement with his service providers (i.e., CARD and the Speech, Language and Learning Center).

In the ALJ Decision, ALJ Brown found that for the period from January 22, 2005 to April 7, 2005, Defendant did not provide Plaintiffs with a FAPE due to its failure to develop a "transition plan." (*See* ALJ Decision, p.18, P28). Thus, ALJ Brown ordered the

Defendant to reimburse Plaintiffs in the amount of $ 12,306.25 for the in-home [*11] ACES program provided from January 22, 2005 to April 7, 2007. (ALJ Decision, p.19, P30). ALJ Brown also found that Defendant denied Plaintiffs a FAPE due to its failure to offer Plaintiff L.M. at least 30 minutes per week of individual speech and language therapy. (*See* ALJ Decision, p.18, P29). Thus, ALJ Brown ordered Defendant to reimburse Plaintiffs for one hour of speech-language therapy per week, provided during the period from January 22, 2005 to July 22, 2005, and from the start of the 2005-2006 school year to the date of the ALJ Decision (i.e., March 28, 2006). (ALJ Decision, p.19, P31).

Plaintiffs argue that in the ALJ Decision, ALJ Brown made various procedural and substantive errors, and seek reimbursement of all privately funded educational expenses incurred from the date of Plaintiff L.M.'s third birthday, [Date Of Birth Omitted], to the date his next annual IEP was convened. Defendant, on the other hand, asserts that the ALJ Decision should be upheld in its entirety.

III. ANALYSIS

A. The Alleged Procedural Violations.

1. Plaintiffs were denied the right to meaningfully participate in the IEP process due to the time limitations placed on Dr. Lenington's evaluation at Palisades.

Plaintiffs [*12] argue that by placing a 20 minute time limitation on Dr. Lenington's observation at Palisades, Defendant violated California Education Code §56329(c). Plaintiffs argue that this procedural violation denied Plaintiffs the right to meaningfully participate in the IEP process. Defendant counters that, if anything, the limitation placed on Dr. Lenington's observation at Palisades is a mere technical violation, and thus does not constitute a procedural violation of the IDEA.

In the ALJ Decision, ALJ Brown noted that Dr. Lenington was not "particularly familiar with [Palisades] or other components of the District's program, and thus [her] testimony regarding the District's program carried less weight than that of Dr. Dores, who helped to design the program and continues to supervise it." (ALJ Decision, P24). ALJ Brown also stated: "given Dr. Dores' extensive knowledge about [Palisades], an additional 70 minutes of Dr. Lenington's observation likely would not have significantly affected the weight given to her testimony regarding the appropriateness of the [placement at Palisades]." (ALJ Decisions P16).

While the Court does not disagree with ALJ Brown's assessment regarding the relative knowledge [*13] and credibility of the witnesses, the Court disagrees with ALJ Brown's conclusion that the time limits placed on Dr. Lenington's observation at Palisades did not constitute a procedural violation. In other words, the Court finds that contrary to Defendant's assertions, the limitations placed on Dr. Lenington's observation at Palisades were not mere technical violations of Cal. Edu. Code §56329. Rather, the limits placed on Dr. Lenington's observation at Palisades constitute a procedural violation of the IDEA by depriving Plaintiffs of the right to meaningfully participate in the IEP process.

ALJ Brown acknowledged that Plaintiffs' "opportunity [to observe at Palisades) was not equal to the [Defendant's] assessors opportunity to observe Plaintiff [L.M.] in his in-home program." (ALJ Decision, p.15, P17). Despite this, ALJ Brown concluded that the violation of Cal. Edu. Code §56329 did not rise to the level of a procedural violation of the IDEA. However, as Plaintiffs point out, the purpose of Cal. Edu. Code §56329 is to "level the playing field" – i.e., to ensure that students and their parents have an equal ability to present information regarding the school district's programs at [*14] the administrative hearing. *See e.g., Benjamin G. V. Special Educ. Hearing Office*, 131 Cal. App. 4th 875, 881, 32 Cal. Rptr. 3d 366 (2005). By limiting the time Dr. Lenington had to observe at Palisades, Defendant not only technically violated Cal. Edu. Code §56329,

Defendant also frustrated the purpose of Cal. Edu. Code §56329 by denying Plaintiffs the opportunity to gather evidence regarding the appropriateness placing Plaintiff L.M. at Palisades. The Court finds that this is a procedural violation of the IDEA.

"Among the most important procedural safeguards [provided by the IDEA] are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." *Clark County Sch. Dist.*, 267 F.3d at 882. Thus, a procedural violation of this sort is adequate grounds for holding that the Defendant failed to provide a FAPE. Without ample opportunity to gather evidence to present at the IEP and/or to the hearing officer – i.e., without the opportunity [*15] to attempt to 'level the playing field' – Plaintiffs were denied their right to meaningfully participate in the IEP, and thus were denied a FAPE.[1]

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[1] Defendant also makes arguments regarding whether Plaintiffs should have made a formal request (in the form of a motion to the hearing officer) for further observation time. Defendant asserts that by failing to do so, Plaintiffs have waived their right to raise this issue at this time. However, Defendant does not cite adequate legal authority to support its position on this issue. Additionally, the Court views these arguments as a mere distraction from the ultimate issue – i.e., whether a procedural violation of the IDEA occurred. Thus, the Court rejects

(Continued on following page)

2. Defendant did not unlawfully predetermine Plaintiff L.M.'s placement and services.

Plaintiffs also argue that Defendant unlawfully predetermined Plaintiff L.M.'s placement and services. Defendant counters that both the administrative record and the ALJ Decision reflect [*16] that during the IEP, the parties discussed the options available, and that the Defendant's offer reflected the desires of Plaintiff L.M. as expressed by his parents. The Court agrees.

As ALJ Brown stated, Plaintiffs have provided "no evidence that the [Defendant's] staff had predetermined the IEP or were unwilling to consider input from the parents." (ALJ Decision, pp.14-15, P15). Plaintiffs have not provided any evidence to demonstrate that Defendant had a policy of refusing to consider one-on-one in-home services. *See e.g., Deal v. Hamilton County Bd. Of Educ.*, 392 F.3d 840, 858 (6th Cir. 2005). Nor have Plaintiffs provided any evidence to demonstrate that Defendant independently developed an IEP that it presented to the parents, without considering the input of the parents, the student's regular teachers/instructors, or any representative of the student's prior placement. *See e.g., W.G. v. Target Range Sch. Dist.*, 960 F.2d 1479,

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Defendant's arguments regarding the timeliness of Plaintiffs' objection to the time limits placed on Dr. Lenington's observations, as well as Defendant's arguments regarding the proper procedure for such an objection.

1485 (9th Cir. 1992). In other words, Plaintiffs have not presented any evidence that Defendant adopted a "take it or leave it" posture at the IEP. *See e.g., id.*

The record of the administrative proceeding, as well as the ALJ Decision, reflect that Defendant [*17] allowed Plaintiffs an ample opportunity to present evidence and opinions to the Defendant, question the Defendant's proposed placement, offer alternatives, and to provide any other input that they felt to be important. (*See* ALJ Decision, p.4, P8 and p.14, P15). As a result, the Court agrees with ALJ Brown that Defendant did not unlawfully predetermine Plaintiff L.M.'s placement, and thus no procedural violation occurred.

3. Defendant did not refuse to allow Plaintiff L.M.'s Father to meaningfully participate in the June 7, 2005 IEP.

Plaintiffs assert that Defendant refused to allow Plaintiff L.M.'s Father to meaningfully participate in the June 7, 2005 IEP. However, the record of the administrative proceeding, as well as the ALJ Decision, reflect that any breakdown in communication at the June 7, 2005 IEP was due to a variety of factors – not the least of which was Plaintiff L.M.'s Father's desire to have his questions answered, regardless of whether his questions were relevant to the issues on the agenda for the IEP, or whether the IEP was an appropriate forum for his particular

questions and concerns. As ALJ Brown stated in the ALJ Decision: "the [Defendant] was not obligated to [*18] let [Plaintiff L.M.'s Father] decide the entire agenda of the IEP meeting, to the exclusion of other pertinent, noticed topics . . . " (ALJ Decision, p.17, P25).

Again, the Court notes that ALJ Brown issued a lengthy, detailed opinion, and supported her findings with testimony and documentary evidence presented by the parties during the hearing. As a result, ALJ Brown's decision is entitled to substantial weight, and the Court declines to disturb ALJ Brown's findings on this issue. Thus, the Court finds that Defendant did not refuse to allow Plaintiff L.M.'s Father to meaningfully participate in the June 7, 2005 IEP, and thus no procedural violation occurred.

B. The Alleged Substantive Violations.

Because the Court has determined that Defendant's violation of Cal. Edu. Code §56329(c) constitutes a procedural violation which denied Plaintiffs the right to meaningfully participate in the IEP process, it is not necessary for the Court to address Plaintiffs' arguments regarding alleged substantive violations of the IDEA.

C. The Requested Relief.

Plaintiffs assert that as a result of the procedural and substantive violations, the ALJ Decision should

be reversed and Defendant should be ordered [*19] to reimburse Plaintiffs for all privately funded educational expenses incurred from the date of Plaintiff L.M.'s third birthday [(Date Of Birth Omitted)] to the date of his next annual IEP. Plaintiffs argue they are entitled to reimbursement pursuant to 20 U.S.C. §1412(a)(10)(C), and that where, as here, the child has received "some educational benefit" from the private program, reimbursement is proper. *Bd. of Trustees of Target Range School Dist.*, 960 F.2d at 1486.

Defendant does not directly address the appropriateness of the requested relief. Rather, Defendant simply argues that the ALJ Decision is entitled to substantial weight, was properly decided, and thus should be upheld. Thus, as Plaintiffs point out, Defendant does not appear to dispute that Plaintiff L.M. received educational benefit from his placement in the ACES and CARD private in-home services.

The Court's review of the record supports the finding that the private in-home services from ACES and CARD were appropriate, under the circumstances. Defendant failed to provide Plaintiffs with a FAPE by failing to comply with the specified procedures for preparing the IEP – i.e., by denying Plaintiffs the right to meaningfully participate [*20] in the IEP process. Plaintiff L.M.'s parents were entitled to services for Plaintiff L.M. until an IEP was

prepared properly, and thus they are entitled to reimbursement.[2]

V. CONCLUSION

Based on the foregoing, and following the exercise of its independent judgment after fully reviewing [*21] the administrative record in this matter, the Court finds that the ALJ Decision is entitled to substantive deference. The Court further finds that the ALJ Decision is supported by a preponderance of the evidence, except that the Court finds that Plaintiffs were denied the right to meaningfully participate in the IEP process due to the time limitations placed on Dr. Lenington's evaluation at Palisades.

As a result of this procedural violation of the IDEA, the Court REVERSES IN PART the ALJ Decision, and REMANDS this matter to the California

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[2] In their opening brief, Plaintiffs ask for reimbursement for all privately funded educational expenses incurred from the date of Plaintiff L.M.'s third birthday [(Date Of Birth Omitted)] to the date his next annual IEP was convened. However, in their reply brief, in addition to reimbursement, Plaintiffs states that "it should be determined that in order to receive meaningful educational benefit [Plaintiff L.M.] required an ABA therapy program of up to 40 hours per week, and, in addition, all related supervision from [CARD] as well as two to four hours per week of individual speech and language therapy provided by South County Speech and Language Pathologists." (Reply, 24:25-25:2). It is inappropriate for Plaintiffs to request additional relief in their reply. As a result, the Court will not consider the additional requested relief, and will only consider Plaintiffs' initial request – i.e. for reimbursement.

Office of Administrative Hearings, Special Education Division, to determine the appropriate amount of reimbursement due to Plaintiffs for all privately funded educational expenses incurred between the date of Plaintiff L.M.'s third birthday [(Date Of Birth Omitted)] to the date of his next annual IEP.

IT IS SO ORDERED.

DATED: March 13, 2007

/s/ Audrey B. Collins

AUDREY B. COLLINS

UNITED STATES DISTRICT JUDGE

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

STUDENT, Petitioner, v. CAPISTRANO UNIFIED SCHOOL DISTRICT, Respondent.	OAH No. N2005070135

DECISION

Administrative Law Judge (ALJ) Suzanne B. Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on February 7-10, 2006, in San Juan Capistrano, California.

Attorney Bruce Bothwell represented the Petitioner Student. Petitioner's parents, Mother and Father, attended the hearing on Petitioner's behalf.

Attorney Dan Harbottle represented Respondent Capistrano Unified School District (District). District Program Specialist Jennifer Fant attended the hearing on the District's behalf during most of the hearing. District Legal Assistant Kimberly Gaither attended the hearing on the District's behalf when Ms. Fant could not be present and when Ms. Fant was testifying as a witness in the hearing.

Petitioner called the following witnesses to testify: Catherine Minch, supervisor for the Center for Autism and Related Disorders (CARD); Cathy Johnson, speech-language pathologist; Tracy Kerins, speech-language pathologist; Dr. Ronald Leaf, licensed psychologist; Jennifer Fant, autism program specialist; Luisa Martinez, school psychologist; Dr. Melanie Lenington, licensed psychologist; April Waldron, special day class (SDC) teacher; Dr. Doreen Granpeesheh, licensed psychologist and clinical director of CARD; Father, Student's father; and Mother, Student's mother.

The District examined all of the above witnesses, and also called Dr. Paul Dores, licensed psychologist, to testify.

On March 21, 2005, the California Special Education Hearing Office (SEHO) received Petitioner's request for due process hearing. On March 31, 2005, the parties agreed to take the case off-calendar. On June 29, 2005, the Petitioner requested that the matter be placed back on calendar; on June 30, SEHO notified the parties that the matter would proceed to hearing beginning on July 26, 2005. On July 1, the case transferred from SEHO to OAH, and OAH assigned the case number N2005070135. On July 25, 2005, OAH granted the parties' joint request to reschedule the hearing for September 14-16, 2005. On September 8, 2005, OAH received notice that the parties agreed to again take the case off-calendar. On October 26, 2005, the parties submitted to OAH a request to place the hearing back on calendar and

schedule the hearing for January 24-27, 2006; thereafter OAH scheduled the hearing for those dates. On January 23, 2006, OAH granted a joint request from the parties for a brief continuance of the hearing, and thereafter the hearing dates were rescheduled for February 7-10, 2006.

The ALJ received sworn testimony and documentary evidence at the hearing on February 7-10, 2006. On February 28, 2006, the parties submitted written closing arguments by mail. Upon receipt of the written closing arguments on March 2, 2006, the record was closed and the matter was submitted.

ISSUES

1. Did the District offer Petitioner a free appropriate public education (FAPE) in the least restrictive environment (LRE) from January 22, 2005, through April 7, 2005?

2. Did the District offer Petitioner a FAPE in the LRE from April 7, 2005, to June 7, 2005?

3. Did the District offer Petitioner a FAPE in the LRE from June 7, 2005, to the present?

4. Is Petitioner entitled to reimbursement for privately funded services and prospective placement with his current providers, CARD and The Speech, Language and Learning Center?

FACTUAL FINDINGS

Jurisdictional Matters

1. Petitioner, born [Date Of Birth Omitted], is a four-year-old student who resides within the boundaries of the District. He is eligible for special education services due to his autism. He currently attends a private program funded by his parents and does not attend any District school.

Factual Background

Initial Diagnosis And Early Intervention

2. In July 2004, when Petitioner was two and a half years old, pediatric neurologist Dr. Leslie Brody diagnosed him with autism. Shortly thereafter, Petitioner's parents sought services for him from the Regional Center of Orange County (Regional Center). In late August 2004, speech-language pathologist Tracy Kerins and school psychologist Sandra Garrison assessed Petitioner at the Interagency Assessment Center (IAC) on behalf of the Regional Center. They determined that Petitioner was eligible to receive early intervention services from the Regional Center due to his autism.

3. Pursuant to an individual family service plan (IFSP) dated August 31, 2004, the Regional Center provided Petitioner with early intervention services including speech-language therapy, occupational therapy (OT), and a one-to-one in-home behavioral program. Ms. Kerins provided Petitioner's speech-language

therapy. Autism Comprehensive Educational Services (ACES), a non-public agency, provided Petitioner's one-to-one in-home behavioral program; Petitioner's ACES program primarily used an Applied Behavioral Analysis (ABA) methodology, although progress reports from ACES indicated some use of other methodologies such as Floortime. Initially, Petitioner's ACES program consisted of ten hours per week, but that increased to 15 hours per week in October or November 2004. Beginning in November or December 2004, Petitioner's parents began privately paying ACES for a few additional hours of one-to-one services per week, eventually increasing Petitioner's ACES program to 25 hours per week.

Individual Education Program (IEP) Process and Petitioner's Privately Funded Program

4. On November 9, 2004, Petitioner's parents and his then-current service providers met with District school psychologist Luisa Martinez to plan Petitioner's transition to the District once he reached his third birthday. In December 2004, Ms. Martinez and speech-language pathologist Melissa Echavez conducted the District's initial assessment of Petitioner, which included observation of Petitioner during his one-to-one ABA instruction in the home. In January 2005, occupational therapist Callie Antuna conducted the OT portion of the assessment.

5. On January 10, 2005, Petitioner's IEP team convened to discuss Petitioner's assessment results

and initial placement in the District. District staff presented the results of the District's December 2004 assessment, and the team members discussed those results and reports from IAC and ACES. District staff recommended goals and objectives for Petitioner, discussed the continuum of placement options available, and made an offer consisting of 23 hours and 50 minutes of direct services per week. That offer consisted of: placement at the District's Palisades Elementary School (Palisades) in a "structured autism" SDC; individual intensive behavioral instruction (IBI) for four hours per week before and after school; speech-language therapy for two 30-minute sessions per week; OT for 30 minutes per week; and extended school year (ESY) services. During the meeting, the parents asked some questions but did not state whether they agreed or disagreed with the offer; instead, they indicated that they needed time to consider the proposed program and observe the Palisades SDC. On January 20, 2005, the IEP team reconvened to consider the assessment report from the occupational therapist.

6. Petitioner turned three years old on [Date Omitted], but did not begin attending school within the District. Instead, he continued to receive one-to-one ABA services from ACES, funded by his parents. Petitioner's parents visited the proposed SDC on two occasions, once accompanied by the Palisades principal and once by Dr. Melanie Lenington, a licensed psychologist who was conducting an independent assessment of Petitioner.

Although Dr. Lenington wanted to observe the SDC for 90 minutes, the observation was limited to 20 minutes pursuant to District-wide policy. Because Dr. Lenington's office is in west Los Angeles, she had to drive at least 90 minutes or more each way to participate in the observation in San Juan Capistrano, and she billed that travel time to Petitioner's parents. Although the District's policy did not limit the number of times an individual could observe a District classroom, Dr. Lenington did not return to conduct any further observations of the SDC.

7. Petitioner's parents did not inform District staff as to whether they accepted the January 2005 IEP offer. In the months of February and March 2005, District school psychologist Luisa Martinez sent letters and made phone calls to Petitioner's parents to follow up on the IEP offer and inquire whether Petitioner would enroll in the District. The District received no response until later in March 2005, when attorney Bruce Bothwell filed a request for hearing alleging that the January 2005 IEP offer denied Petitioner a FAPE.

8. In a letter dated April 7, 2005, District autism program specialist Jennifer Fant wrote to Petitioner's parents in response to the due process request. The April 7 letter reiterated what the District had offered at the January 2005 IEP meetings, and offered additional services in response to the parents' concerns raised in the due process request. The additional services consisted of a transition plan and additional IBI services. The additional IBI services

included four hours per week of IBI tutoring in the home, which increased to 27 hours and 50 minutes the amount of direct services that Petitioner would receive per week.[1] The transition plan described in Ms. Fant's April 7 letter proposed to transition Petitioner from his in-home program to the school-based program over a period of four weeks, and provided for District funding of some in-home ABA services provided by ACES during that four-week period. Attached to Ms. Fant's April 7 letter was a copy of the District's notice of parent rights and an information sheet about the District's IBI program. Also attached to the letter was a brochure describing the components of the District-wide preschool and kindergarten structured autism program, called the Building Language, Academics and Social skills through Structured Teaching (BLASST-off) program.[2]

9. In May 2005, Petitioner's parents requested another IEP meeting to discuss the District's offer of placement and services, while Ms. Martinez wrote to ask the parents to attend an addendum IEP meeting to discuss ESY recommendations. On June 7, 2005, Father and the District members of the IEP team convened for an IEP meeting. During the discussion, Father asked several pointed questions about the

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[1] The offer of additional IBI services also included one hour per week of supervision and ten hours of parent training and skills generalization in the home.

[2] The proposed SDC at Palisades is part of the BLASST-off program.

methodology of the District's program, including what peer-reviewed research supported the program and whether the jigsaw drawing on the IBI information sheet indicated that the District's program was an "eclectic" program. After some discussion, District staff members objected that Father was interrogating them, while Father objected that the District employees were not answering all of his questions. Ms. Fant sought to change the topic to recommendations specific to Petitioner, including the specifics of the District's ESY offer; Father objected and stated that District staff could use the final two minutes of the meeting to talk about their topics. Finally, Ms. Fant ended the meeting and handed Father a copy of the District's "Civility Policy". District staff wrote the specific components of the ESY offer in the IEP notes, and reiterated both the regular school year and ESY offers in a follow-up letter dated June 13, 2005.

10. Petitioner continued to receive privately funded services from ACES and from speech-language pathologist Cathy Johnson.[3] By all accounts, Petitioner showed improvement over the course of receiving those services, including a decrease in problem behaviors and increase in language. In June 2005, Petitioner's parents enrolled him in a typical preschool, which he attended with a one-to-one shadow aide. After a couple of months, his parents withdrew

[3] Ms. Johnson's non-public agency (NPA) was originally called South County Speech Pathology, but is now known as The Speech, Language and Learning Center.

him from the preschool because they felt that he was not learning anything.

11. In September 2005, when an opening with CARD became available, Petitioner switched providers and began receiving his program from CARD instead of ACES. Due to staffing availability and Petitioner's tolerance, initially Petitioner received only 14 hours of direct services per week in his CARD program. CARD increased that amount as staff became available and as Petitioner became more comfortable with his new ABA tutors; the number of hours gradually increased and, in early 2006, reached the total of 36 per week. Recent CARD progress reports and the testimony of Petitioner's CARD supervisor, Catherine Minch, established that Petitioner also made educational gains from his CARD program.

Petitioner's Areas of Deficit and Educational Needs

12. Over the course of the time period at issue, Petitioner's skills and behaviors improved from week to week, as he received educational services. Moreover, while the parties' witnesses gave markedly different recommendations regarding what type of program Petitioner required, overall the various assessments, progress reports, and witness testimony were fairly consistent in their descriptions of Petitioner's deficits and level of functioning. Petitioner's areas of need included self-help/adaptive skills, speech and language, communication, social skills,

cognition, attention, and behavior. He had scattered skills, with particular strengths such as his knowledge of numbers and shapes, compared to greater difficulties with language and abstract concepts. He had severe delays in both expressive and receptive language. In December 2004, he tended to speak in single words rather than longer utterances, and had an expressive vocabulary of approximately 100 words. By July 2005, his expressive vocabulary had increased to 200 words, and he used some short phrases in addition to single words.

13. In late 2004 and early 2005, Petitioner demonstrated some self-stimulatory behaviors and frequent tantrums, although these behaviors decreased as he received educational services. In November 2004, his parents reported that he had previously demonstrated self-injurious behaviors, such as hitting his head, but that those behaviors had stopped recently. He continued to demonstrate noncompliant behaviors. Regarding social and emotional functioning, overall Petitioner was severely impaired. Nonetheless, he enjoyed social interaction and had emerging social behaviors, such as attempting to please his mother by complying with her requests, pulling his mother's head closer and kissing her, and sometimes turning his head when his name was called.

14. Typical of many children with autism, Petitioner had a short attention span and had difficulty focusing on a task. As of November 2004, when using a picture schedule, he was able to sit for up to 45

minutes when working one-to-one with his ABA tutor on preferred activities. Additionally, he often had difficulty transitioning between tasks or locations. He exhibited little difficulty transitioning when he was in a familiar environment, such as his home, and he was guided by a familiar adult, such as his ABA tutor. In contrast, he often had ongoing tantrums when his parents brought him to new environments with unfamiliar people, unfamiliar activities, and an unfamiliar routine, such as when he went to a doctor's appointment, or to a health assessment followed by an OT assessment at a new school.

Speech-Language Therapy

15. Petitioner required speech-language therapy as a designated instruction and service (DIS). District speech-language pathologist Tracy Kerins attended Petitioner's January 10, 2005 IEP meeting, and would have been Petitioner's speech-language therapist at Palisades. Testimony from Ms. Kerins established that, in light of the totality of the District's proposed placement and services, 30 minutes of individual speech-language instruction and 30 minutes in small group per week would have addressed Petitioner's needs. Ms. Kerins' testimony was credible for several reasons, including her expertise in speech-language and her prior experience working with Petitioner.

16. As noted in Factual Findings 2 and 3, Ms. Kerins conducted a speech-language assessment of

Petitioner in late August 2004, and provided him with one hour per week of individual speech-language therapy from early November 2004 until mid-January 2005. Ms. Kerins' testimony that Petitioner made meaningful progress over the course of those sessions is not in dispute and is supported by other evidence, such as Dr. Lenington's observations of Petitioner's language gains during that time period. Ms. Kerins explained that the SDC was structured to develop the students' language throughout the school day. In part because of the SDC placement, the mode of Petitioner's speech-language therapy could shift to a combination of individual and small group therapy. As also discussed during the testimony of speech-language pathologist Cathy Johnson, small group sessions offer opportunities to work on goals such as turntaking.

17. While Ms. Johnson was also knowledgeable about Petitioner's speech-language needs, her recommendation that Petitioner needed solely individual speech-language instruction for more hours each week was not ultimately persuasive. There is little question that Petitioner could benefit from additional speech-language sessions, but that is not what is required for provision of a FAPE. Considering that the Petitioner has the burden of proving his claims, Ms. Johnson's testimony did not overcome the other credible evidence establishing that individual therapy for 30 minutes per week and small group therapy for 30 minutes per week was appropriate.

18. In the January 2005 IEP document, the mode identified for delivering the 60 minutes of speech-language services per week was "Individual and Group; Direct and Collaboration; Monitor and Consult." Petitioner's parents understood this to mean that Petitioner would receive his speech-language therapy in a small group setting, with the potential for individual instruction but no guarantee.

19. In the April 7, 2005 letter described in Factual Finding 8, Ms. Fant reiterated the January 2005 offer, but listed the speech-language therapy offer as "two times per week for 30 minutes, small group, on campus." In the June 7, 2005 IEP document, the mode of speech-language therapy offered is listed as "Individual and Group; Direct Instruction" for two 30-minute sessions per week. Similarly, in the District's June 13, 2005 follow-up letter written by Ms. Fant, the speech-language therapy component is described as "two times per week for 30 minutes, individual and small group, on campus."

District's Proposed SDC Placement and Individual IBI Tutoring

20. As noted above in Factual Finding 5, the District offered placement in a structured autism SDC taught by April Waldron at Palisades.[4] The SDC

[4] Ms. Waldron is an experienced special education teacher who has had considerable training related to autism and holds a

(Continued on following page)

was designed for pre-kindergarten and kindergarten students, ages three to six, who were within the "moderate to severe" range of autism. The class consisted of seven students, three trained instructional aides, and the teacher. The SDC students had mainstreaming with general education kindergarten students on a regular basis. The SDC structure and curriculum emphasized behavior, social skills, language and communication. The SDC staff received support and assistance from a team of specialists including an occupational therapist, a speech-language pathologist, an autism program specialist, and a licensed clinical psychologist experienced in working with individuals with autism.

21. The District's January 2005 offer included individual IBI tutoring at school.[5] Ms. Waldron and trained IBI tutors would provide four hours per week before and after school in the SDC room. The District's April 2005 offer added four hours of IBI tutoring in the home. The in-home IBI tutoring would similarly be provided by trained IBI tutors, but would be supervised by one of two District IBI supervisors. Both the proposed in-school IBI tutoring and the proposed in-home IBI tutoring included offers for supervision time and monthly student progress meetings;

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master's degree in special education from the University of Kansas.

[5] While the District describes the entire BLASST-off program as an IBI program, the proposed "individual IBI tutoring" is essentially discrete trial training (DTT).

the offer of in-home IBI tutoring also provided for parent training and skills generalization.

22. The testimony of knowledgeable District witnesses, including Ms. Waldron, Ms. Fait, Ms. Kerins, and Dr. Paul Dores, established that the SDC placement and IBI tutoring would address Petitioner's needs and would allow him to make educational progress. The Palisades SDC utilized a small teacher-to-student ratio and ABA methods integrated into the daily instruction to provide the individual attention and intensive instruction that Petitioner required. The SDC used effective behavior intervention strategies, such as getting the child's attention, breaking down the new information into chunks, using modeling, prompting and reinforcement, and taking data to measure the effectiveness of the instruction. While the small teacher-to-student ratio and individual IBI tutoring would ensure that Petitioner received individual instruction, the group setting would offer opportunities for facilitated peer interactions; conversely, the setting would avoid the dependency on prompts and over-reliance on the one-to-one instructor that can occur when a child is in a one-to-one setting exclusively. Petitioner was at a level of functioning wherein he could transition to this type of structured, supportive SDC designed for students with moderate to severe autism. Although Petitioner's overall functioning would generally have been in the lower range among the students in the Palisades SDC, in some areas he was functioning at levels higher than many other students in the class.

23. Petitioner presented testimony from expert witnesses, in particular Dr. Ronald Leaf, that only programs using solely ABA methods are appropriate interventions for autistic preschoolers, while "eclectic" programs utilizing more than one type of instructional methodology, such as a combination of ABA and Floortime, are ineffective. Dr. Leaf concurred with a research article's opinion that it is surprising how many prominent individuals and organizations in the autism community endorse an eclectic approach. Dr. Leaf also confirmed that he considered ACES to be an eclectic program. While Dr. Leaf is indisputably a well-recognized expert on autism, for several reasons his testimony did not establish that the District's proposed program was inappropriate for Petitioner. Dr. Leaf was not familiar with the District's program. In contrast, Dr. Dores, who designed and supervises the District's IBI program, persuasively testified that it was an ABA-based program that did not use methodologies such as Floortime.[6] Moreover, as discussed

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[6] IBI is a methodology that utilizes ABA principles specific to autism. While Dr. Dores did not characterize the District's IBI program as eclectic, he noted that different professionals have different definitions of what constitutes an eclectic approach. For example, some professionals might consider a program to be eclectic if it included both ABA and sensory integration, while others would not. In any event, Petitioner's depiction of the program as "eclectic" rests principally upon a jigsaw drawing on the District's IBI information sheet. Testimony from Dr. Dores, Ms. Fant, and Ms. Waldron established that the BLASST-off program was designed to implement ABA methods, and that the jigsaw drawing did not represent that a variety of methodologies would be delivered in the District's program.

further under Legal Conclusion 5, so long as the District offers an appropriate program, methodology is a matter within the District's discretion. Furthermore, Petitioner's educational progress in his ACES program contradicts Petitioner's argument that any eclectic approach would, by definition, have been inappropriate for him.

24. Dr. Lenington and Dr. Granpeesheh each testified that the District's offer did not include enough individual instruction, that Petitioner's needs were so severe that he could not learn in a group setting, and that a one-to-one, in-home ABA/DTT program for 35 to 40 hours per week was the only program that would have been appropriate. For several reasons, the ALJ did not ultimately find those opinions persuasive. Neither Dr. Lenington nor Dr. Granpeesheh was particularly familiar with the Palisades SDC or other components of the District's program, and thus their testimony regarding the District's program carried less weight than that of Dr. Dores, who helped design the program and continues to supervise it.[7] As noted in Factual Finding 25, the SDC's low teacher-to-student ratio ensured that Petitioner would receive significant adult attention

[7] As discussed further in Legal Conclusion 17, Dr. Lenington should have been permitted to observe the Palisades SDC for the full 90 minutes that she sought, instead of the 20 minute observation that was permitted. However, the additional 70 minutes of observation time likely would not have significantly affected the weight given to Dr. Lenington's testimony on this point, given Dr. Dores' far greater familiarity with the SDC.

throughout the school day, in addition to the one-to-one instruction he would receive during IBI, speech-language therapy, and OT.

25. Moreover, consistent with Factual Finding 12, while Dr. Lenington was more familiar with Petitioner than Dr. Dores was, Dr. Lenington's reports of Petitioner's functioning were generally consistent with the District's understanding of Petitioner's functioning, as described in the District's assessment report, IEP present levels of performance, and testimony of District witnesses. For example, as noted in Factual Finding 13, Dr. Lenington's evaluation report described how, while Petitioner's social skills were severely impaired, he nevertheless enjoyed social interaction and had emerging social behaviors. Hence, the divergence in the witnesses' recommendations for Petitioner's placement appeared to hinge less upon differing understandings of Petitioner's needs, and more upon different philosophical beliefs about when students with autism should receive instruction in any type of group setting. The preference of Petitioner's witnesses to delay the entry of autistic children into a classroom did not establish that Petitioner needed to remain in a home program for all of his instructional hours. While the one-to-one, in-home program recommended by Drs. Lenington and Granpeesheh would have allowed Petitioner to make educational progress, such a placement was highly restrictive, contrary to the District's obligation to offer placement in the LRE that would address Petitioner's unique needs.

26. Regarding testimony that the District's offer of approximately 24, and later 28, hours per week was insufficient, those opinions were not ultimately persuasive in light of several factors, including the determinations in Factual Findings 10, 11, and 12 that Petitioner made progress in an in-home program which ranged from 15 to 25 hours per week. The additional in-home tutoring offered in April 2005 ensured greater individual instruction from which Petitioner would certainly benefit; however, consistent with Factual Findings 23 and 25, the January 2005 offer of approximately 24 hours per week was nevertheless sufficient to address Petitioner's needs.

27. Petitioner raised other arguments concerning the proposed SDC and IBI tutoring, but these claims did not succeed. For example, Petitioner contended that the IBI tutors were unqualified because the hiring qualifications were reportedly less stringent than the qualifications required for CARD tutors. Ms. Fant established in her testimony that the minimum qualifications for IBI tutors included a high school diploma or general equivalency diploma (GED) and 19 hours of training. However, many of the tutors have more extensive qualifications, including advanced degrees. Petitioner failed to support his contention with any evidence regarding the actual qualifications of the IBI tutors. In light of all circumstances, the evidence did not support Petitioner's position, and Petitioner did not meet his burden of proving his claim on this point.

Transition Plan

28. While the District's proposed program would have provided approximately the same number of direct service hours that Petitioner was receiving from ACES in January 2005, Petitioner's attendance in the SDC would have involved a new location, new people, new demands placed upon him, and a change from a one-to-one setting to a group setting. Given Petitioner's resistance to transitions, he would have had difficulty switching from his one-to-one in-home program to an SDC at a school. Accordingly, had Petitioner enrolled in the Palisades SDC, he would have needed a transition plan to facilitate the change to his new environment.[8]

29. The January 2005 IEP did not contain a formal transition plan. Instead, in the section of the January 2005 IEP entitled "Support for Transition," District staff wrote: "Team recommends family and [Petitioner] visit school and program." Ms. Fant and Ms. Martinez testified that this language meant that if the parents agreed to bring Petitioner to the SDC for a visit, the SDC staff would observe him in the classroom and determine to what extent he required transition services.[9]

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[8] This type of transition plan should not be confused with an Individual Transition Plan (ITP), which concerns the transition of older students from school to postschool activities. (See Cal. Ed. Code § 56345.1.)

[9] Testimony from Ms. Fant and Ms. Martinez established that, while District staff believed that developing the transition

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30. After receiving the parents' due process filing and concluding that Petitioner would not be visiting the SDC as recommended, District staff instead offered a formal transition plan. The transition plan described in Ms. Fant's April 7, 2005 letter proposed District funding of some ACES services for four weeks, beginning with 12 hours per week and tapering off to one hour per week in the fourth week of the plan. Similarly, the transition plan proposed gradually increasing Petitioner's attendance at Palisades, and also provided for collaboration between ACES and District staff. This transition plan offered the type of transition services, for an adequate time period, which Petitioner would have needed to facilitate the change to his new placement.

LEGAL CONCLUSIONS

Applicable Law

1. The parties dispute whether the federal law applicable in this matter is the Individuals with Disabilities in Education Act of 1997 (IDEA), which was the applicable law until June 30, 2005, or the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), which became effective on July 1, 2005. The District's IEP offer was for the period from January 2005 to January 2006, and thus

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plan this way was the best approach to address Petitioner's needs, the District would have developed the transition plan at the IEP meeting if the parents had so requested.

the program would have been in effect both before and after July 1, 2005.

2. Both case law and the rules of statutory construction dictate that the applicable law is the statute in place at the time the IEPs were developed. (See *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 n. 1 (citing *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1148 n. 2).) There is no question that the IDEA remained effective until July 1, 2005. Petitioner does not cite any legal authority to support his contention that IEPs developed prior to the effective date of the new law nevertheless must comply with those requirements. Thus, under Petitioner's theory, from January to June 2005, a school district would be required to comply with both the law in place at the time of the IEP meeting (IDEA) and the law scheduled to go into effect on July 1, 2005 (IDEIA). The alternative option would be that every school district nationwide would need to revise every student's IEP exactly on July 1, 2005, to comply with the new requirements effective on that date. Either result would be absurd, and there is no indication that Congress intended either result. (See 108 H.Rpt. 77 (2003); 108 S.Rpt.185 (2003).) Accordingly, the IDEA is the applicable law for the IEPs at issue in this case, and all citations to Title 20 United States Code are to sections in effect prior to July 1, 2005, unless otherwise noted.

3. Under the IDEA, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d).) FAPE consists of special education and related services that

are available to the child at no charge to the parent or guardian, meet the State educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(8).) "Special education" is defined as specially designed instruction, at no cost to the parents, that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25)) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(22); Cal. Educ. Code § 56363(a).)

4. There are two parts to the legal analysis in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist v. Rowley,* (1982) 458 U.S. 176, 200, 102 S.C. 3034.) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at 206-07.)

5. In the *Rowley* opinion, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to

participate in the IEP process. *(ML. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. Regarding procedural requirements, both State and federal law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Cal. Ed. Code §§ 56304, 56342.5; 34 C.F.R. § 300.501(a), (c).) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP meeting, and that does not constitute predetermination of the IEP. (*Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990)); aff'd, 361 F.3d 80 (1st Cir. 2004).) However, when a school district predetermined the child's program and did not consider the parents' requests with an open mind, the school district denied the parents their right to participate in the IEP process. (*Deal v. Hamilton County Bd. of Education* (6th Cir.2005) 392 F.3d 840, 858.)

7. Another key aspect of the parents' right to participate in the IEP process is the school district's obligation to make a formal written offer which clearly identifies the proposed program. *(Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) Additionally, the parents' right to participate in the IEP process includes the right to have the parents' independent expert observe the proposed placement. (*Benjamin G. v. Special Education Hearing Office*, (2005)

131 Cal.App.4th 875, 32 Cal.Rptr.3d 366; see Cal. Ed. Code § 56329, subd. (c).) California Education Code section 56329, subdivision (c), specifies that "If a public education agency observed the pupil in conducting its assessment . . . an equivalent opportunity shall apply to . . . observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding."

8. Regarding substantive appropriateness under the IDEA, the Supreme Court's *Rowley* opinion addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The Court determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at 200.)

9. Moreover, the *Rowley* opinion established that, as long as a school district provides an appropriate

education, methodology is left up to the district's discretion. (*Rowley,* 458 U.S. at 208.) Subsequent case law confirms that this holding is squarely on point in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon,* 195 F.3d at 1149; *Pitchford v. Salem-Keizer Sch. Dist.,* 155 F. Supp. 2d 1213, 1230-32 (D. Ore. 2001); *T.B. v. Warwick Sch. Comm.* (1st Cir.2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B.*, 361 F.3d at 84 (citing *Roland M.*, 910 F.2d at 992-93).) In *Adams,* 195 F.3d at 1149-1150, wherein the parents of a toddler with autism sought a one-to-one, 40-hour per week ABA/DTT program modeled after the research of Dr. O. Ivar Lovaas, the Ninth Circuit Court of Appeal explained:

> Neither the parties nor the hearing officer dispute the fact that the Lovaas program which Appellants desired is an excellent program. Indeed, during the course of proceedings before the hearing officer, many well-qualified experts touted the accomplishments of the Lovaas method. Nevertheless, there are many available programs which effectively help develop autistic children. *See, e.g.,* E.R. Tab 9; Dawson & Osterling (reviewing eight effective model programs). IDEA and case law interpreting the statute do not require potential maximizing services.

> Instead the law requires only that the IFSP in place be reasonably calculated to confer a meaningful benefit on the child. (citing *Gregory K. v. Longview School District*, (9th Cir. 1987) 811 F.2d 1307, 1314.)

10. School districts are also required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (201 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550(b); Cal. Ed. Code § 56031.) To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (*Id.*)

11. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K*, 811 F.2d at 1314.) If the school district's program was designed to address Petitioner's unique educational needs was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit.

12. The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight . . . an IEP must take into account what was, and what was not,

objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams,* 195 F.3d at 1149 (citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

13. In an administrative hearing, Petitioner has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. ___ [126 S.Ct. 528, 163 L.Ed 2d 387].)

14. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 369-370; *Student W. v. Puyallup Sch. Dist* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. For example, parents are not required to conform their unilateral placement to the content of the child's IEP, need not provide a placement that is certified by the state, and need not provide a placement in the LRE. The placement still must have met the child's needs and provided educational benefit. (*Florence County Sch. Dist., Four v. Carter* (1993) 114 S.Ct. 361; *Alamo Heights*

Independent Sch. Dist. v. State Bd. of Education (5th Cir. 1986) 790 F.2d 1153, 1161.)

Determination of Issues

Issue 1: Did the District offer Petitioner a FAPE in the LRE from January 22, 2005, through April 7, 2005?

Predetermination of IEP

15. Petitioner contended that the District unlawfully predetermined the January 2005 IEP offer, and that this procedural violation denied him a FAPE. As determined in Factual Finding 5, the parents asked questions at the IEP meeting, but did not express disagreement with the offer or request any other services. Moreover, as determined in Factual Finding 8, when the District finally learned that the parents sought a different program in a one-to-one setting, staff attempted to address the parents' concerns by offering additional hours of one-to-one instruction. There was no evidence that the District staff had predetermined the IEP or were unwilling to consider input from the parents, and Petitioner's contentions to the contrary were unsupported. Thus, no procedural violation occurred.

Length of Observation by Parents' Independent Evaluator

16. Petitioner contended that the District's limitation of the length of Dr. Lenington's observation

to 20 minutes was a procedural violation which significantly interfered with the parents' right to participate in the IEP process. As determined in Factual Finding 6, the District restricted Dr. Lenington's observation of the SDC to 20 minutes, pursuant to District-wide policy applied to all observations of District classrooms. In theory, Dr. Lenington could have returned for additional observations, but to do so would have required her to make additional round trips between west Los Angeles and San Juan Capistrano, with all travel time billed to Petitioner's parents.

17. While potentially an independent evaluator may seek to observe for an unreasonably long time, that was not the case here, where Dr. Lenington would otherwise have observed the Palisades SDC for only 90 minutes. California Education Code section 56329, subdivision (c), does not specify how long the independent evaluator may observe the proposed placement, only that it must be an "equivalent opportunity" to the public education agency's observation of the student when conducting the agency's assessment. The District's initial assessment included observation of Petitioner in his in-home program, and that observation was not limited to 20 minutes.[10]

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[10] Subsequent to Dr. Lenington's observation of the SDC, the District filed a motion with OAH to order Petitioner's parents to permit the District's expert witness to observe Petitioner in his in-home placement. The District opposed Petitioner's request to limit the District's observation to 20 minutes, and argued that "Education Code [section] 56329(d) does not set any

(Continued on following page)

Hence, while the District gave Petitioner's evaluator an opportunity to observe the proposed placement, that opportunity was not equivalent to the District assessors' opportunity to observe Petitioner in his in-home program. In light of all circumstances, the limitation of Dr. Lenington's observation to 20 minutes violated section 56329, subdivision (c).

18. The next question is whether this procedural violation constitutes a denial of FAPE. The purposes behind section 56329, subdivision (c), include allowing the parents to obtain expert opinion regarding the appropriateness of the proposed placement, and allowing the parents to participate in a due process hearing with an expert witness prepared to provide a knowledgeable opinion about the proposed placement. (See *Benjamin G.*, 131 Cal.App.4th at 881, 884.) Here, Dr. Lenington indicated in her testimony that, while she would have preferred to observe for the full 90 minutes, she was still able to develop opinions about the SDC, advise the parents regarding the SDC, and give informed testimony at the hearing regarding the SDC. Additionally, in the present case, given Dr. Dores' extensive knowledge about the SDC, an additional 70 minutes of Dr. Lenington's observation likely would not have significantly affected the weight given to her testimony regarding the appropriateness of the SDC. Hence, given the particular

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time limits on the District's ability to observe Student in his private placement." OAH concurred, and ordered Petitioner to permit an observation for three consecutive school hours.

facts of this case, the procedural violation did not seriously interfere with the parents' right to participate in the IEP process, and thus did not rise to the level of a procedural denial of FAPE.

Speech-Language Therapy

19. As determined in Factual Finding 15, Petitioner needed 30 minutes of individual speech-language instruction and 30 minutes in small group per week. However, as determined in Factual Finding 18, the January 2005 IEP offered two 30 minutes sessions to be provided in "Individual and Group; Direct and Collaboration; Monitor and Consult." As also determined in Factual Finding 18, Petitioner's parents did not understand this as an offer of 30 minutes of individual speech-language therapy each week. The parents' interpretation of the January 2005 IEP was not unreasonable; given the District's obligation to make a clear written offer of placement and services, the January 2005 IEP did not clearly inform the parents that the District was offering one of the weekly speech-language therapy sessions on an individual basis. To this extent, the failure to clearly offer 30 minutes of weekly individual speech-language therapy denied Petitioner a FAPE.

SDC Placement and Individual IBI Services

20. Pursuant to Factual Findings 20-27, the SDC placement and IBI services were designed to address Petitioner's unique needs and were reasonably

calculated to provide him with educational benefit. In light of these determinations, the January 2005 offer of SDC placement and IBI services constituted a substantive offer of FAPE.

Transition Plan

21. As determined in Factual Finding 28, Petitioner needed a transition plan to facilitate his switch from his in-home program to attendance at a school. As determined in Factual Finding 29, District staff did not offer a transition plan in January 2005, and instead intended to observe Petitioner in the SDC to determine to what extent he needed transition services. While developing a transition plan separately from a placement offer does not necessarily violate the District's obligation to make a clear written offer, one key problem in the present case is that the IEP document did not reflect the District staff's intention to develop a transition plan if needed. Moreover, it is dubious whether the District would have offered a transition plan after Petitioner's visit to the SDC occurred. Testimony from school psychologist Luisa Martinez that "one hundred percent" of the children she placed transitioned to an SDC without any difficulty, casts doubt on whether the District would have offered the transition services that Petitioner needed. Accordingly, the lack of a transition plan failed to offer Petitioner a program designed to address his unique needs, and thus constituted a substantive denial of FAPE for this time period.

Issue 2: Did the District offer Petitioner a FAPE in the LRE from April 7, 2005, to June 7, 2005?

Speech-Language Therapy

22. As determined in Factual Finding 15, Petitioner needed 30 minutes of individual speech-language instruction and 30 minutes in small group per week. However, as determined in Factual Finding 19, the April 7, 2005 letter listed the speech-language therapy offer as "two times per week for 30 minutes, small group, on campus." Thus, because the offer did not include 30 minutes of weekly individual speech-language therapy, the offer was not designed to address Petitioner's unique needs and, therefore, denied him a FAPE to that extent.

SDC Placement and Individual IBI Services

23. Pursuant to Factual Findings 20-27, the SDC placement and IBI services were designed to address Petitioner's unique needs and were reasonably calculated to provide him with educational benefit. In light of these determinations, the April 2005 offer of SDC placement and IBI services constituted a substantive offer of FAPE.

Transition Plan

24. Pursuant to the determinations in Factual Finding 30, the transition plan offered in the April 7, 2005 letter was appropriate and constituted a substantive offer of FAPE.

Issue 3: Did the District offer Petitioner a FAPE in the LRE from June 7, 2005, to the present?

Parent Participation In The June 7, 2005 IEP Meeting

25. Petitioner contended that the District denied his parent's right to participate in the IEP process when, during the June 7, 2005 IEP meeting, District staff did not answer all of Father's questions about the methodology and research supporting the District's BLASST-off program. Pursuant to the determinations in Factual Finding 9, District staff attempted to ensure that Father was an equal participant in the discussion at the meeting. It is disingenuous for Petitioner to claim that the District staff's failure to field all of Father's numerous questions on the complex topic of autism research denied the parent's right to participate. The breakdown in communication between the parent and District staff appears to have been due to various factors, including tension related to the due process filing. In any event, the District was not obligated to let Father decide the entire agenda of the IEP meeting, to the exclusion of other pertinent, noticed topics such the ESY placement. Considering all of the circumstances, the ALJ finds that no procedural violation occurred.

Speech-Language Therapy

27. As determined in Factual Finding 15, Petitioner needed 30 minutes of individual speech-language instruction and 30 minutes in small group

per week. As determined in Factual Finding 19, the June 13, 2005 follow-up letter identified the mode of speech-language therapy as "two times per week for 30 minutes, individual and small group, on campus." While under other circumstances this language could convey an offer of 30 minutes of individual therapy and 30 minutes of group therapy, the meaning is less clear given the legitimate confusion regarding the January 2005 offer. Pursuant to Factual Finding 18, District staff at the January 2005 IEP conveyed to Petitioner's parents that the offer included the possibility of individual speech-language therapy, but no guarantee. Given this history, had the District sought to offer 30 minutes of individual speech-language therapy, that offer needed to be conveyed more specifically, to distinguish from the similar language of the prior offer that did not necessarily promise a weekly individual session. As such, the June 2005 offer did not clearly offer 30 minutes of individual speech-language therapy, and denied Petitioner a FAPE to that extent.

SDC Placement and Individual IBI Services

27. Pursuant to Factual Findings 20-27, the SDC placement and IBI services were designed to address Petitioner's unique needs and were reasonably calculated to provide him with educational benefit. In light of these determinations, the June 2005 offer of SDC placement and IBI services constituted a substantive offer of FAPE.

Issue 4: Is Petitioner entitled to reimbursement for privately funded services and prospective placement with his current providers, CARD and The Speech, Language and Learning Center?

28. As determined in Legal Conclusion 21, the District denied Petitioner a FAPE from January 22, 2005, through April 7, 2005, due to the District's failure to offer a transition plan. While the District had otherwise offered an appropriate placement for this period, Petitioner would not have been able to make meaningful educational benefit in the placement without first successfully transitioning into the placement. Therefore, reimbursement of Petitioner's in-home program during this period is warranted. Consistent with Factual Finding 10, the in-home ACES program was designed to meet Petitioner's unique needs and reasonably calculated to allow him to receive educational benefit, and the District did not dispute this. Accordingly, the District shall reimburse the parents in the amount of $12,306.25, which was the cost of the ACES program for that period.

29. As determined in Legal Conclusions 19, 22, and 26, the District denied Petitioner a FAPE for the entire period at issue by failing to offer at least 30 minutes of individual speech-language therapy per week. Pursuant to Factual Finding 10, Petitioner's private speech-language therapy was designed to meet his unique needs and reasonably calculated to allow him to receive educational benefit, and the District did not dispute this. Because Petitioner required a total of one hour of speech-language

therapy per week, and given his difficulties with transitions and unfamiliar people, it would likely not have been feasible for the parents to enroll Petitioner in small group speech-language therapy at school, and then supplement this with 30 minutes of individual speech-language therapy from a private provider. Therefore, the District shall reimburse the parents for a total of one hour per week of individual speech-language therapy provided from January 22, 2005 to July 22, 2005, and from the start of the 2005-2006 school year to the date of this Decision. While Father testified regarding the total costs of the private speech-language therapy, the evidence does not establish the costs to the parents for one hour per week of the therapy. Therefore, the parents shall submit proof of such costs to the District.

ORDER

30. The District shall reimburse Petitioner's parents in the amount of $12,306.25, for the in-home ACES program provided from January 22, 2005, to April 7, 2005.

31. Upon receipt of proof, the District shall reimburse Petitioner's parents for one hour of speech-language therapy per week, provided during the period from January 22 to July 22, 2005, and from the start of the 2005-2006 school year to the date of this Decision.

32. All of Petitioner's other claims for relief are denied.

PREVAILING PARTY

33. Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

Issue 1: Petitioner prevailed only regarding the transition plan and the District's failure to clearly offer 30 minutes of weekly individual speech-language therapy. The District prevailed all of the remaining components of this issue.

Issue 2: Petitioner prevailed only regarding the failure to offer 30 minutes of weekly individual speech-language therapy. The District prevailed on all of the remaining components of this issue.

Issue 3: Petitioner prevailed only regarding the failure to clearly offer 30 minutes of weekly individual speech-language therapy. The District prevailed on all of the remaining components of this issue.

Issue 4: Petitioner prevailed only to the extent that he obtained reimbursement for his in-home behavioral program from January 22, 2005, through April 7, 2005, and also obtained reimbursement for one hour per week of individual speech-language therapy from January 22 to July 22, 2005, and from the start of the 2005-2006 school year to the date of this Decision The District prevailed on the all of the remaining components of this issue.

RIGHT TO APPEAL THIS DECISION

34. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Cal. Ed. Code § 56505, subd. (k).)

Dated: March 28, 2006

/s/ Suzanne B. Brown
SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division

OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:	OAH No.
STUDENT,	N2005070135
Petitioner,	
v.	
CAPISTRANO UNIFIED SCHOOL DISTRICT,	
Respondent.	

February 8, 2006

San Juan Capistrano, California

The above-entitled matter came on for hearing pursuant to notice at 9:00 a.m.

BEFORE: SUZANNE B. BROWN
Administrative Law Judge

Official Transcriber: Karin R. Lewis

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* * *

[Testimony of Luisa Martinez]

[302] Q The District conducted extensive observations of [Name Of Minor Child Omitted] in his home, with his ABA program – with his ABA provider. Is that right?

A Yes.

Q Do you recall how many hours you observed or minutes, how many occasions?

A I believe I went three times myself. I believe Melissa went another two times.

Q Do you know how long the duration was, at least at the meeting, of the observations you went to?

A I'm sure at least an hour at a time to an hour and a half.

Q Why would you go for so long? Do you need to go for that long in order to make a relevant observation?

A Yes. I like to see how the child – how long the child can work for. And then also, they transition from different tasks.

* * *

[SEAL]
State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
OAL DKT. NO. EDS 13813-08
AGENCY DKT. NO. 2009 13961

S.B. AND K.B.
ON BEHALF OF P.B.,

Petitioners,

v.

PARK RIDGE BOARD
OF EDUCATION,
Respondent.

Beth A. Callahan, Esq., for petitioners (Callahan & Fusco, attorneys)

Paul C. Kalac, Esq., for respondent (Parker McCay, attorneys)

BEFORE RICHARD McGILL, ALJ:

This matter involves a request by S.B. and K.B. (hereinafter "petitioners" or "parents") for a due process hearing on behalf of their three-year-old daughter, P.B., who is eligible for special education and related services as a preschool child with a disability based upon a diagnosis of autism. The primary relief sought by petitioners in this proceeding is reimbursement for their unilateral placement of P.B. initially in a home-based program and subsequently at the Institute for Educational Achievement.

The central allegation in the request for a due process hearing is that petitioners have not been able to determine whether the Preschool Disabled Valley Model Program, known as the Sullivan Center, which is the placement proposed by the Park Ridge Board of Education (hereinafter "respondent"), would be appropriate for P.B., because the Sullivan Center has refused to allow their expert to observe the program proposed for P.B. The Sullivan Center is an out-of-district public school operated by the Westwood Regional Board of Education (hereinafter "Westwood"). Petitioners now seek an order excluding all evidence concerning the Sullivan Center, because respondent has failed to comply with an Order dated January 28, 2009, requiring respondent in specific terms to provide petitioners' expert access to the Sullivan Center to conduct an observation.

PROCEDURAL HISTORY

The request for a due process hearing on behalf of P.B. was filed with the Office of Special Education on August 14, 2008. The matter was transmitted to the Office of Administrative Law on December 4, 2008, for a hearing in accordance with 20 *U.S.C.A.* § 1415 and 34 *C.F.R.* § 300.511. Hearings have been scheduled and adjourned several times for reasons related mainly to petitioners' efforts to have their expert conduct an observation at the Sullivan Center.

On January 13, 2009, petitioners filed a motion for Partial Summary Judgment or in the alternative

to suppress all evidence in relation to the Sullivan Center. The basis for the motion was that petitioners had hired an expert, Dr. Anita Breslin, to evaluate P.B.'s needs and the potential programs. Despite petitioners' requests, an observation of the Sullivan Center by Dr. Breslin did not take place. Thereafter, petitioners withdrew their motion for Partial Summary Decision by letter dated January 15, 2009, with the balance of the motion still pending. Respondent's response was received on January 20, 2009, arguing *inter alia* that suppression of evidence was too harsh where petitioners did not first seek an order to compel discovery. An oral argument in regard to the motion was conducted on the same date. At the end of the oral argument, the undersigned directed petitioners' attorney to submit a letter specifying details as to the requested observation.

On January 27, 2009, the undersigned received from petitioners' attorney a letter and form of order setting forth details for the requested observation. Satisfied with the details set forth in the form of Order, the undersigned issued an Order dated January 28, 2009, ordering as follows: (1) the motion to suppress respondent's evidence regarding the Sullivan Center was denied; (2) respondent was ordered to provide discovery in the form of an observation of the Sullivan Center, information and materials in accordance with the terms of the Order; and (3) petitioners may renew their motion to suppress in the event that respondent had not complied with the Order by February 13, 2009.

By letter dated February 4, 2009, respondent's attorney advised that respondent had every intention of complying with the Order dated January 28, 2009, but that Westwood would not agree to the terms in the letter dated January 27, 2009, from petitioners' attorney. In effect, the letter advised that Westwood would not comply with the Order dated January 28, 2009. By letter dated February 6, 2009, respondent further advised that it could not force Westwood to comply with the Order dated January 28, 2009.

By letter dated February 13, 2009, petitioners advised that respondent failed to comply with the Order dated January 28, 2009, and renewed their motion to suppress respondent's evidence regarding the Sullivan Center. Both parties submitted briefs and certifications in support of their respective positions, and an oral argument was conducted on March 13, 2009.

ISSUES

The issues in regard to reimbursement for unilateral placement by the parents are derived from *N.J.A.C.* 6A:14-2.10 and are as follows: (1) whether the school district has made a free appropriate public education available to the student in a timely manner; (2) whether the private placement is appropriate; and (3) whether the cost of reimbursement should be reduced or denied in accordance with *N.J.A.C.* 6A:14-2.10(c). The issues with respect to the requested sanction pursuant to *N.J.A.C.* 1:1-14.14 are as follows: (1)

whether the Order dated January 28, 2009, is valid and lawful; (2) whether respondent failed to comply with the Order dated January 28, 2009; (3) if so, whether the failure was unreasonable; and (4) whether the circumstances warrant the requested sanction.

LEGAL FRAMEWORK

As a recipient of Federal funds under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 *U.S.C.A.* § 1400 *et seq.*, the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education. 20 *U.S.C.A.* § 1412. A free appropriate public education includes special education and related services. 20 *U.S.C.A.* § 1401(9). The requirement of a free appropriate public education is implemented in New Jersey through regulations codified at *N.J.A.C.* 6A:14-1.1 *et seq.* The responsibility to provide a free appropriate public education is specifically placed on the district board of education. *N.J.A.C.* 6A:14-1:1(d).

In regard to procedural requirements, any party shall have the opportunity to present a complaint in regard to educational placement of a child or the provision of a free appropriate public education. 20 *U.S.C.A.* § 1415(b)(6). The parents shall have the opportunity for an impartial due process hearing in regard to such complaint. 20 *U.S.C.A.* § 1415(f)(1)(A).

PETITIONERS' MOTION

Petitioners maintain that respondent failed to comply with the Order dated January 28, 2009, requiring respondent to provide an opportunity for petitioners' expert to conduct an observation at the Sullivan Center, that said failure has the effect of denying petitioners the opportunity to present a case in regard to the issue whether the proposed placement at the Sullivan Center would provide P.B. with a free appropriate public education (FAPE), and that the circumstances warrant a sanction. In support of the motion, petitioners presented the certifications of their attorney, Beth A. Callahan, Esq., and their expert, Anita Breslin, Psy.D., BCBA. As a sanction for noncompliance with the Order dated January 28, 2009, petitioners seek suppression or exclusion of respondent's evidence related to the Sullivan Center.

RESPONDENT'S OPPOSITION

Respondent raises multiple arguments in opposition to petitioners' motion. First, respondent maintains that the Order dated January 28, 2009, is defective in several respects. Second, respondent contends that it attempted to comply, albeit on Westwood's terms as opposed to those set forth in the Order dated January 28, 2009. Third, respondent argues that an administrative law judge does not have the authority to impose a sanction in this context. Finally, respondent maintains that a sanction that suppresses or excludes its evidence concerning the Sullivan Center is too harsh.

ANALYSIS

The applicable regulation is *N.J.A.C.* 1:1-14.14(a), which provides in pertinent part as follows: "For unreasonable failure to comply with any order of a judge or with any requirements of this chapter, the judge may . . . 2. Suppress a defense or claim; 3. Exclude evidence; . . . or 5. Take other appropriate case related action. Respondent's opposition outlines the issues to be considered in regard to petitioners' motion.

Respondent offers several arguments to the effect that the Order dated January 28, 2009, is defective. First, respondent argues that it was not given the opportunity to comment on the proposed form of order submitted by petitioners prior to issuance of the Order dated January 28, 2009. As a corollary, respondent maintains that it remains willing to comply with the substance of the Order dated January 28, 2009, albeit only on terms acceptable to Westwood.

Consideration of the substance of this argument requires analysis of the respective proposals for the observation by the parents' expert. As reflected in the Order dated January 28, 2009, petitioners maintain that their expert needs the following: (1) 3.5 hours of observation of core instructional time in the classroom proposed for P.B.; (2) observation of related services; (3) up to an additional hour and a half to meet with all staff who would have worked with P.B. to have questions answered regarding the Sullivan

Center program; and (4) documentation related to the proposed program including sample instructional programs from June 2008, sample graphs, a description of staff training protocol, a description of parent training services and a copy of the curriculum that would have been used for P.B.

By comparison, Westwood has a written policy setting forth observation guidelines as follows:

- The duration of the program observation *cannot exceed 20 minutes.*
- The observation must be pre-scheduled.
- The observer must be accompanied by a faculty member or administrator for the duration of the observation.
- The observation of the program cannot disrupt the continuity of programming.
- The observer must preserve the confidentiality of students and staff.
- The observer is not permitted to interview staff and or students.
- The observer may submit questions in writing for follow-up by staff and or district administration.
- Audio and video recording is absolutely forbidden.

[Emphasis in original.]

By letter dated February 4, 2009, respondent's attorney advised that Westwood would relax its policy

to allow petitioners' expert to observe the proposed program for one hour. According to the letter, both Westwood and respondent believe that one hour is more than sufficient time to observe the program. But Westwood would not agree to provide documentation or to allow petitioners' expert to interview its staff members.

One consideration is the specific need for the discovery. *N.J.A.C.* 1:1-10.1(c). The source of information concerning the specific need for discovery would be the certifications submitted by the parties. Consistent with *N.J.A.C.* 1:1-12.4(a), the undersigned advised the parties by letter February 18, 2009, that any factual assertions should be supported by a certification. Dr. Breslin's certification states that without full access to the core components of the program offered for P.B. and the related documentation, she would not be able to determine the appropriateness of the proposed program. In addition, petitioners' attorney provided a certification detailing the expert's need for the various forms of discovery.

Respondent's attorney submitted a certification in which he stated that he sent the letter dated February 4, 2009, which includes the statement that both Westwood and respondent believe that an observation for one hour would be sufficient. But respondent presented no certification or affidavit from an educator stating that twenty minutes or one hour would be sufficient time for petitioners' expert to observe the Sullivan Center program. Likewise, there is no certification or affidavit from an educator

stating that petitioners' expert would not need to see documentation related to the proposed program or any of the other items required by the Order dated January 28, 2009.

In evaluating the certifications, the undersigned has the benefit of having heard cases of the type previously and being familiar with the nature of the factual issues and the sort of testimony and exhibits to be presented at the hearing. With respect to the observation, the applied behavioral analysis (ABA) therapy would likely be provided by more than one individual. Petitioners' expert would need to see these individuals provide ABA therapy, and she would also need to see the related services including speech, occupational and physical therapy. The suggestion that twenty minutes or even one hour would be sufficient for the observation is completely unrealistic in relation to the needs of the outside expert. In contrast, petitioners' contentions as to the needs of their expert with respect to each item set forth in the Order dated January 28, 2009, are meritorious as setting forth realistic and specifically needed observations, material and information to prepare for the hearing in this matter.

Another consideration under *N.J.A.C.* 1:1-10.1(c) is the oppressiveness of the discovery request. In my view, the discovery set forth in the Order dated January 28, 2009, is not remotely onerous or oppressive in relation to the likely cost to the parents for their unilateral placement.

Respondent next argues that there is no specific provision authorizing the parents' expert to observe the proposed program. Respondent acknowledges that a parent must be given the opportunity to observe the proposed educational placement prior to implementation of the IEP in accordance with *N.J.A.C.* 6A:14-4.1(k), but respondent maintains that this provision does not apply to an outside consultant.

There are two difficulties with this argument. First, remedial social legislation is to be liberally construed to achieve its beneficent purposes. *Squeo v. Comfort Control Corp.*, 99 *N.J.* 588, 596 (1985). As such, IDEA should be read broadly to achieve its purposes. In this context, the parent needs the assistance of an expert to present a case. It would follow that the term "parent" should be read to authorize the parents' expert to observe the proposed program. More importantly, the presence of an express provision pertaining to the parent should not be read as an exclusion of all others. General provisions related to discovery such as *N.J.A.C.* 1:1-10.2(a)2 and 3 provide support for the Order dated January 28, 2009.

Respondent next argues that Westwood is not a party to the proceeding and therefore cannot be ordered to allow an observation. Further, respondent cannot compel Westwood to permit an observation.

The difficulty with this argument is that the district board of education is responsible for providing the child with a free appropriate public education and

related services. *N.J.A.C.* 6A:14-1.1(d). Further, the district board of education retains this responsibility in the event of an out-of-district placement, *e.g.*, *N.J.A.C.* 6A:14-4.3(d). Here, respondent brought Westwood into the case by selecting Westwood as the placement for P.B. Therefore, respondent remains responsible for the acts or omissions of Westwood with respect to P.B.'s education.

It follows from the above that respondent's arguments to the effect that the Order dated January 28, 2009, is defective are without merit. The next question is whether respondent complied with the Order dated January 28, 2009.

Respondent argues that it attempted to comply with the Order dated January 28, 2009, albeit on Westwood's terms. There are two difficulties with this argument. First, Westwood's terms do not equate to compliance with the provisions in the Order dated January 28, 2009. Second, the first step to comply with the Order was to provide written notice to Dr. Breslin as to the date for the observation. However, Dr. Breslin's certification indicates that she was never contacted with a date for the observation. And respondent has not provided a certification which states that a date was ever set for the observation. Under the circumstances, respondent's contention that it took any steps toward compliance with the actual provisions of the Order dated January 28, 2009, is without merit.

The next issue is whether the circumstances warrant a sanction and, if so, the nature thereof. In arguing that an administrative law judge does not have the authority to impose a sanction in a special education case, respondent relies on the fact that the special hearing rules applicable to special education, *N.J.A.C.* 1:6A-1.1 to -18.5, do not authorize a sanction for failure to comply with a discovery order.

It is true that the special hearing rules related to special education do not specifically authorize a sanction. But the special rules related to special education specifically provide that any aspect of notice and hearing not covered by the special rules shall be governed by the Uniform Administrative Procedure Rules contained in *N.J.A.C.* 1:1. *N.J.A.C.* 1:6A-1.1(a). The special rules apply to the extent that they are inconsistent with the general rules, *Ibid.* Here, the absence of a special rule on sanctions is not an inconsistency with the general rules, specifically, *N.J.A.C.* 1:1-14.14, but rather is an area not covered by the special rules. It follows that respondent's argument is without merit.

Respondent next argues that it offered a free appropriate public education to P.B. and that a denial of FAPE due to procedural violations may be found only in limited circumstances. The pertinent regulation is *N.J.A.C.* 6A:14-2.7(k), which provides as follows:

> The decision made by an administrative law judge in a due process hearing shall be

> made on substantive grounds based on a determination of whether the child received a free, appropriate public education (FAPE). In matters alleging a procedural violation, an administrative law judge may decide that a child did not receive a FAPE only if the procedural inadequacies:
>
> 1. Impeded the child's right a FAPE;
> 2. Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or
> 3. Caused a deprivation of educational benefits.

There are two difficulties with respondent's argument. First, respondent's assertion that it provided a FAPE for P.B. is untested due to the fact that the parents have been denied the observation, materials and information that would be necessary to evaluate the program offered by the Sullivan Center. Under the circumstances, respondent's assertion that it offered a FAPE to P.B. is not accepted as true. Second, the above quote of *N.J.A.C.* 6A:14-2.7(k) tracks language contained in 20 *U.S.C.A.* § 1415(f)(3)(E)(ii). But the very next provision, 20 *U.S.C.A.* § 1415(f)(3)(E)(iii), states as follows: "Rule of construction. Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with the procedural requirements of this section." This means

that 20 *U.S.C.A.* § 1415(f)(3)(E)(ii), and therefore *N.J.A.C.* 6A:14-2.7(k), pertain to procedural violations as alleged in the due process complaint and not to the procedures related to the due process hearing itself.

One procedural requirement is the opportunity for an impartial due process hearing. 20 *U.S.C.A.* § 1415(f)(1)(A). In order to have a meaningful hearing, petitioners need the observation, materials and information required by the Order dated January 28, 2009. The Order dated January 28, 2009, was properly designed to guard petitioners' right to an impartial due process hearing, and it is now necessary to deal with non-compliance therewith. It follows that respondent's reliance on *N.J.A.C.* 6A:14-2.7(k) is misplaced.

Therefore, respondent's arguments that an administrative law judge does not have the authority to impose a sanction in a special education case are without merit. The remaining issues are whether the failure to comply with the Order dated January 28, 2009, was unreasonable and whether the circumstances warrant the requested sanction. These issues are interrelated and will be considered together.

Respondent maintains that suppression or exclusion of all evidence concerning the Sullivan Center as a sanction is too harsh. According to respondent, a lesser action such as an order to compel discovery should be taken before imposing a harsh sanction such as suppression or exclusion of evidence.

The difficulty with respondent's argument is that this action has already been taken in this matter. Petitioners filed their original motion to suppress all evidence related to the Sullivan Center on January 13, 2009. By Order dated January 28, 2009, petitioners' motion to suppress evidence related to the Sullivan Center was denied, and respondent was ordered to provide discovery. It follows that respondent's argument is without merit.

Respondent argues that exclusion of all evidence concerning the Sullivan Center is too harsh because that sanction would amount to suppression of its entire defense. Respondent's argument is unpersuasive for two reasons. First, exclusion of all evidence related to the Sullivan Center would not suppress respondent's entire defense. The certifications submitted by respondent clearly contain assertions of unreasonable actions by the parents. This would constitute a defense under *N.J.A.C.* 6A:14-2.10(c) and would not be impacted by the requested sanction.

The second reason is really the crux of the matter in regard to this motion. In order to determine whether the proposed sanction of suppression or exclusion of all evidence related to the Sullivan Center is warranted, it is essential to understand fully the parents' specific need for the discovery in question. The first consideration is that the determination of the adequacy of an individualized education program (IEP) is a matter of expert opinion. *Johnston by Johnston v. Ann Arbor Public Schools,* 569 F.Supp. 1502, 1508-09 (E.D. Mich. 1983). The testimony of a

parent who is not an expert is not sufficient to rebut unanimous expert opinion presented by a school district. *Id.*, at 1509, It follows that expert testimony is critically important to petitioners as they would have essentially no chance of winning the case without it.

In order for the testimony of an expert in the form of opinions or inferences to be admissible, it must be based on facts and data perceived by or made known to the witness at or before the hearing. *N.J.A.C.* 1:1-15.9(b)1. This is a version of the net opinion rule. It has long been established that an expert's bare conclusion, unsupported by factual evidence, is inadmissible. *Buckelew v. Grossbard,* 87 *N.J.* 512, 524 (1981). It follows from this rule that the testimony of Dr. Breslin would be inadmissible unless she has facts and data concerning the program proposed for P.B. at the Sullivan Center.

The certifications submitted on behalf of petitioners indicate that Dr. Breslin needs facts and data in the form of observations, documents and information from personnel at the Sullivan Center. The need of observation of the personnel such as teachers, aides and therapists is self-evident for Dr. Breslin to evaluate the proposed program. The need for documents may not be so obvious, but written records of programs used in ABA are critically important. Finally, it seems evident to the undersigned that information from personnel at the Sullivan Center would be essential in addition to written materials and observations of sufficient length. All of these

types of discovery are essential for the parents' consultant to present expert opinion. Without this discovery, the parents are almost certain to lose the issue of whether respondent offered P.B. a FAPE and therefore the entire case.

Westwood's observation guidelines must be considered in relation to the question of the reasonableness of respondent's failure to comply with the Order dated January 28, 2009. It is noteworthy that no certifications were submitted in defense of Westwood's observation guidelines. One provision of the guidelines states that the duration of the program observation cannot exceed twenty minutes. For her purposes, Dr. Breslin would need to observe the teacher(s), possibly aides, and therapists. It is evident that twenty minutes would be woefully inadequate for Dr. Breslin's purposes. Respondent's attorney mentioned a possible relaxation of the limit to one hour, but this amount of time would also be inadequate for Dr. Breslin's purposes.

It is noteworthy that there is no provision in Westwood's guidelines for review of materials, but respondent's attorney indicated in a letter dated February 4, 2009, that Westwood would not provide the information requested by petitioners. This decision would deny Dr. Breslin material that would be essential for her to form an opinion about the program at the Sullivan Center.

The observation guidelines also contain a provision to the effect that the observer is not

permitted to interview staff or students. Putting aside interviews of students, it seems evident that in addition to the observation and materials, Dr. Breslin would need someone to explain the proposed program.

As noted above, no one offered any rationale to support Westwood's observation guidelines. In addition, Westwood's guidelines and unwillingness to provide written materials would deny an outside consultant the essentials of an observation of sufficient duration, written materials and information from personnel at the Sullivan Center, *i.e.*, the facts and data, that would be necessary to offer admissible expert opinion. These circumstances indicate that Westwood's observation guidelines and policies are unreasonable. Further, Westwood's observation guidelines seem to be calculated to deny an outside consultant the facts and data necessary to give admissible expert testimony. In the absence of legitimate reasons for these policies, the inference is warranted that the Sullivan Center intended the natural consequences of its guidelines and policies. This amounts to bad faith.

The final question is whether Westwood's unreasonableness and bad faith should be attributed to respondent. The problem is that either petitioners will be without admissible expert testimony as the result of Westwood's unreasonableness and bad faith and in a position where in all likelihood they will lose their case or respondent will have its evidence concerning the Sullivan Center excluded and

therefore in a position where it will lose on the issue whether it offered a FAPE.

There is no legitimate reason for petitioners to suffer as the result of Westwood's unreasonableness and bad faith. In contrast, respondent brought Westwood into the proceeding by arranging for placement of P.B. at the Sullivan Center. Further, respondent continues to be responsible for P.B.'s education in accordance with *N.J.A.C.* 6A:14-1.1(d). Finally, the burden on respondent is not quite as heavy in that there are two other issues on which respondent could win the case. It follows that respondent should bear responsibility for Westwood's unreasonableness and bad faith.

The undersigned is well aware of the impact that the proposed sanction will have on respondent. But in view of the severe impact that failure to impose the requested sanction would have on petitioners, **I CONCLUDE** that exclusion of all evidence concerning the Sullivan Center as the placement for P.B. is warranted under the circumstances of this case.

Accordingly, it is **ORDERED** that all evidence concerning the Sullivan Center as the placement for P.B. shall be excluded in this matter.

April 21, 2009 /s/ Richard McGill
DATE **RICHARD McGILL**,
cl/sej ALJ